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**21(1)(a)**

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# SUPREME COURT APPOINTMENTS SINCE 2004 - Summary Chart

Vacancy	Advisory Committee / Selection Panel (submits shortlist to Minister of Justice)	Public hearing before <i>ad hoc</i> Committee (Minister of Justice or Nominee)	Days elapsed between announcement of retirement / resignation and appointment	New Justice(s)	Notes
Iacobucci Arbour	No	Yes (Minister)	161 (Iacobucci) 192 (Arbour) (177 average)	Abella Charron	Though resignations announced on separate dates, both vacancies filled using a single process. Federal election intervened (June 28, 2004).
Major	Yes	Yes (Nominee)	210	Rothstein	Federal election intervened (January 23, 2006).
Bastarache	Yes (but dissolved)	No	257	Cromwell	Federal election intervened (October 14, 2008). Prime Minister dissolved Selection Panel process.
Binnie Charron	Yes	Yes (Nominee)	161	Karakatsanis Moldaver	
Deschamps	Yes	Yes (Nominee)	140	Wagner	
Fish (Nadon)	Yes	Yes (Nominee)	164	*Nadon	Appointment of Justice Nadon declared <i>void ab initio</i> by Supreme Court.
Fish (Gascon)	No	No	413	Gascon	
LeBel	No	No	192	Côté	
Rothstein	No	No	129	Brown	
<b>AVERAGE - All processes</b>			205	205 days from announcement of Justice Cromwell's resignation is October 13, 2016.	
<b>AVERAGE - Processes with Advisory Committee and/or Public Hearing</b> (The process to fill the Bastarache vacancy is included, though the Selection Panel was ultimately dissolved. Also included is the first process to fill the Fish vacancy, though ultimately declared <i>void ab initio</i> .)			185	185 days from announcement of Justice Cromwell's resignation is September 23, 2016.	

## SUPREME COURT APPOINTMENTS SINCE 2014 - Timelines

Vacancy	Resignation / Retirement announced	Resignation effective	Long-list provided to Advisory Committee / Selection Panel	Shortlist provided to Minister	Proposed nominee named publicly	Public Hearing before <i>ad hoc</i> Committee (Minister or nominee)	Appointment	New Justice	Days position vacant	Notes
Iacobucci	2004-03-22	2004-06-30	No Committee	None	2004-08-24	2004-08-25	2004-08-30	Abella		Federal election on June 28, 2004
Timeline (days)	0	100			155	156	161		61	
Arbour	2004-02-20	2004-06-30	No Committee	None	2004-08-24	2004-08-25	2004-08-30	Charron		Federal election on June 28, 2004
Timeline (days)	0	131			186	187	192		61	
Major	2005-08-03	2005-12-25	2005-10-17	2005-11-24	2006-02-23	2006-02-27	2006-03-01	Rothstein		Federal election January 23, 2006 (Parliament dissolved November 29, 2005).
Timeline (days)	0	144	75	113	204	208	210		66	
Bastarache	2008-04-09	2008-06-30	Not known	None	2008-09-05	None	2008-12-22	Cromwell		Federal election October 14, 2008 (Parliament dissolved September 7, 2008). Prime Minister dissolved Selection Panel process.
Timeline (days)	0	82			149		257		175	
Binnie	2011-05-13	2011-10-21	Not known	Not known	2011-10-17	2011-10-19	2011-10-21	Karakatsanis		
Timeline (days)	0	161			157	159	161		0	
Charron	2011-05-13	2011-08-30	Not known	Not known	2011-10-17	2011-10-19	2011-10-21	Moldaver		
Timeline (days)	0	109			157	159	161		52	
Deschamps	2012-05-18	2012-08-07	Not known	Not known	2012-10-02	2012-10-04	2012-10-05	Wagner		
Timeline (days)	0	81			137	139	140		59	
Fish (*Nadon)	2013-04-22	2013-08-31	Not known	Not known	2013-09-30	2013-10-02	2013-10-03	*Nadon		Appointment declared <i>void ab initio</i> by Supreme Court.
Timeline (days)	0	131			161	163	164		33	
Fish	2013-04-22	2013-08-31	No Panel	None		None	2014-06-09	Gascon		
Timeline (days)	0	131					413		282	
LeBel	2014-05-23	2014-11-30	No Panel	None		None	2014-12-01	Côté		
Timeline (days)	0	191					192		1	
Rothstein	2015-04-24	2015-08-31	No Panel	None		None	2015-08-31	Brown		
Timeline (days)	0	129					129		0	
<b>AVERAGE</b>	0	126	75	113	163	167	198		72	
Cromwell	2016-03-22	2016-09-01								
Timeline (days)	0	163								



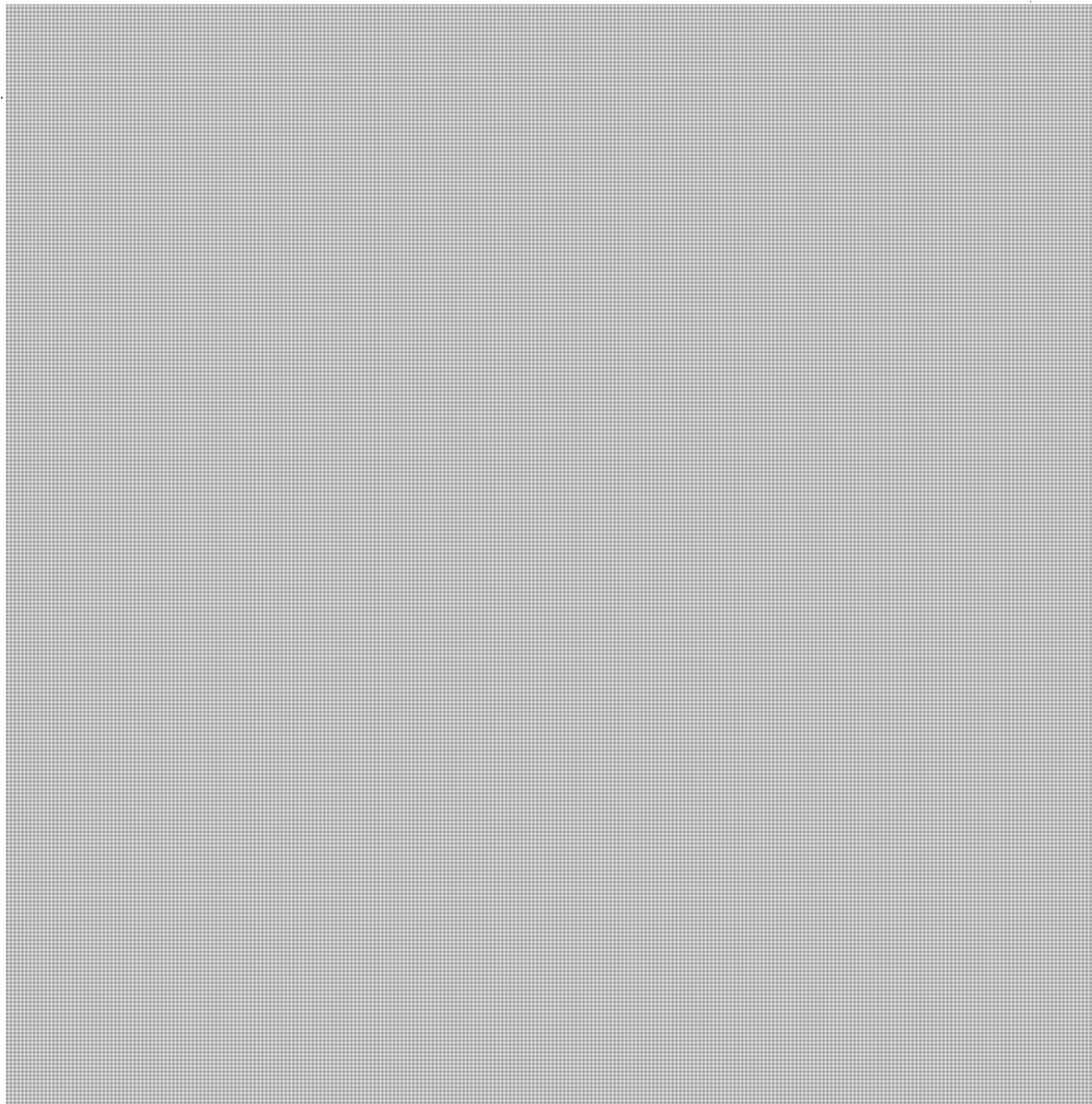
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s.21(1)(a)

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2016-014787

**Talking Points**  
**Call to Chief Justice McLachlin:**  
**Supreme Court of Canada Appointments Process**



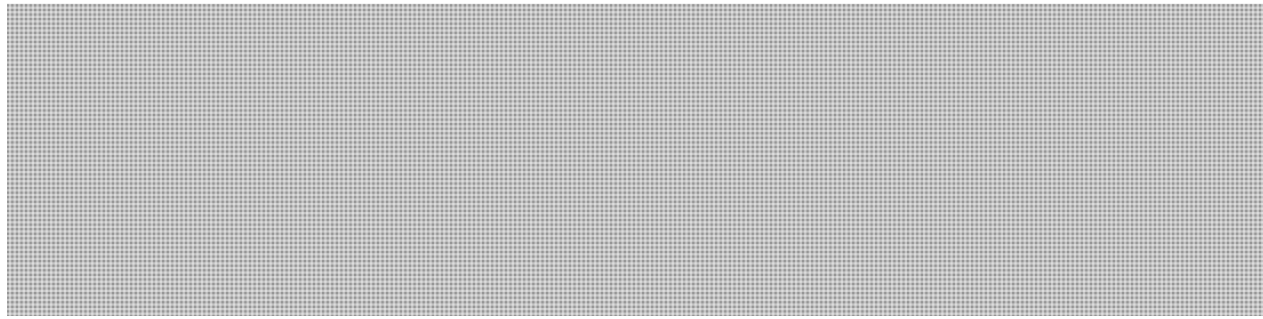


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s.21(1)(a)



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Department of Justice  
Canada

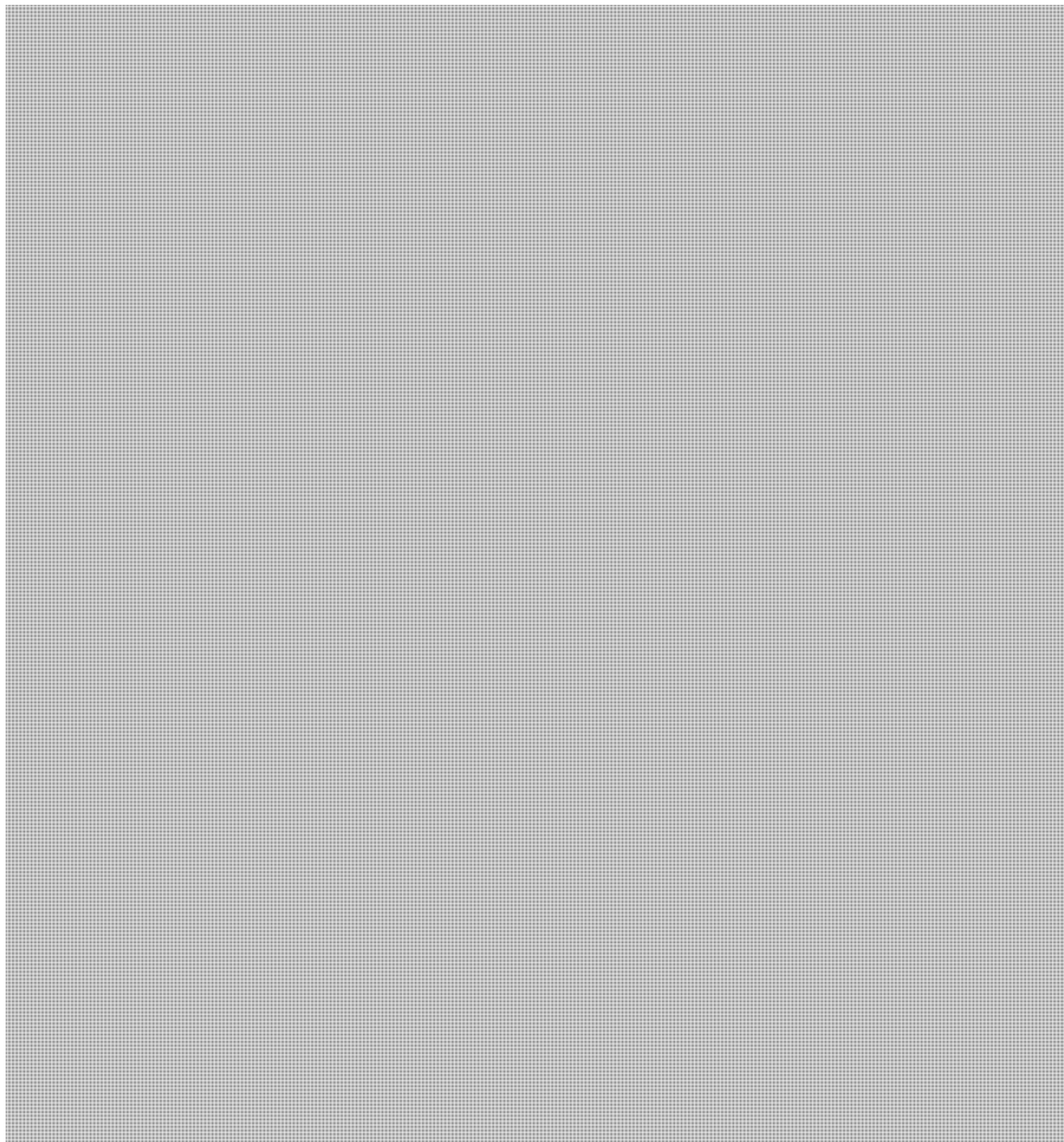
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## Talking Points

### Supreme Court of Canada Appointments Process

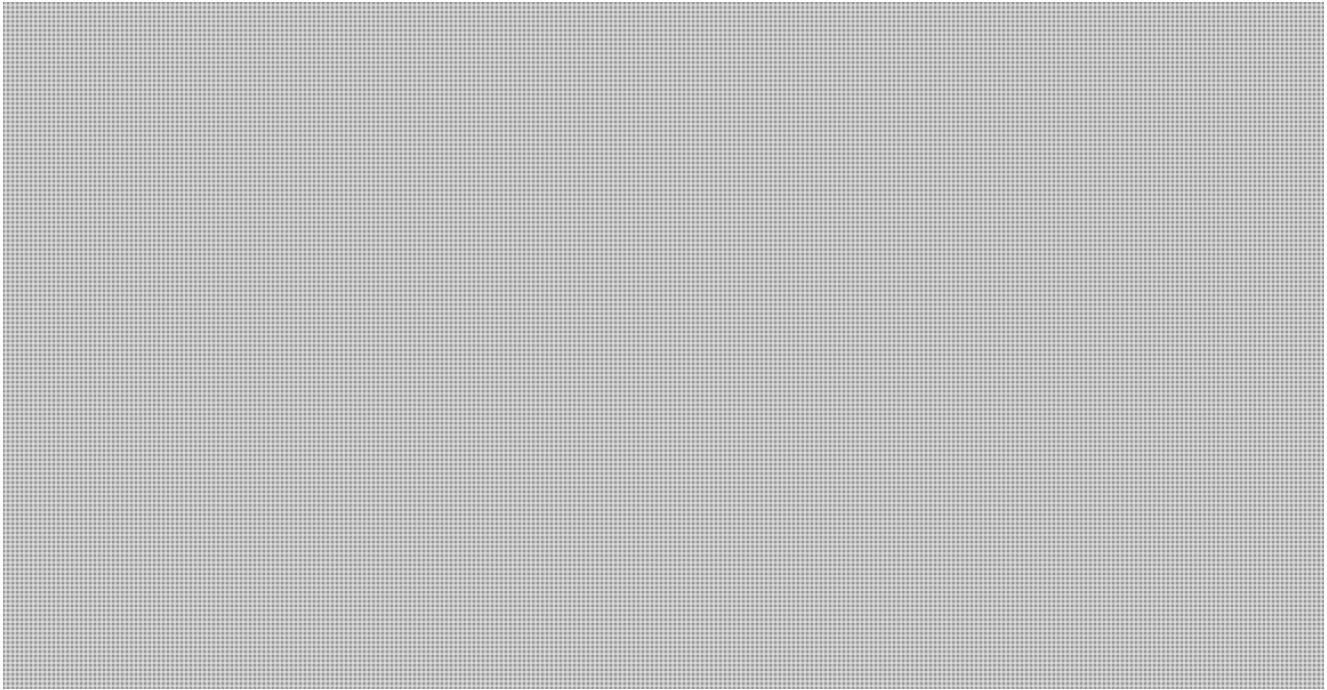


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**21(1)(a)**

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s.21(1)(b)

FOR INFORMATION

NUMERO DU DOSSIER/FILE #:2016-000311

COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: PROTECTED B

**TITRE/TITLE: Bilingualism and the Supreme Court of Canada**

**SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY**

- In your mandate letter, the Prime Minister has asked that you “Engage all parties in the House of Commons to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians. Consultations should be undertaken with all relevant stakeholders and those appointed to the Supreme Court should be functionally bilingual”. This memorandum discusses the bilingualism component of the commitment specifically.



Soumis par (secteur)/Submitted by (Sector):

Public Law Sector

Responsable dans l'équipe du SM/Lead in the DM Team:

Sarah Geh

Revue dans l'ULM par/Edited in the MLU by:

Matt Ignatowicz

Soumis au CM/Submitted to MO: January 19, 2016



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2016-000311

## MEMORANDUM FOR THE MINISTER

### Bilingualism and the Supreme Court of Canada

#### ISSUE

This note provides information with respect to the Government's commitment to ensure that newly-appointed justices of the Supreme Court of Canada (SCC) are functionally bilingual.

#### BACKGROUND

In your mandate letter, the Prime Minister has asked that you "Engage all parties in the House of Commons to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians. Consultations should be undertaken with all relevant stakeholders and those appointed to the Supreme Court should be functionally bilingual."

The *Supreme Court Act* (SCA) does not contain any provision regarding the bilingual capacity of SCC judges. The Court is also expressly excluded from the duty of institutional bilingualism set out in section 16 of the *Official Languages Act* (OLA), to which other federal courts are subject. The Supreme Court has, however, implemented administrative measures to ensure that litigants appearing before it are able to use the official language of their choice in written and oral pleadings. Simultaneous interpretation services are available to judges during oral hearings.

In recent years, unilingual appointments to the SCC have been rare. Of the 17 appointments to the SCC since 1997, only two have been unilingual Anglophones.<sup>1</sup> Even so, bilingual capacity has remained a point of controversy, and calls continue for the imposition of a bilingualism requirement on all new SCC appointees. Typical is the argument of Quebec Premier Philippe Couillard who, in his August 14, 2015 letter to federal party leaders, stated [translation]:

[I]n a bijuridical and bilingual country, to exercise their function, it is necessary for all of the judges of the SCC to master the French language. They must be capable of understanding, without intermediaries, the pleadings, the legislation, the case law and academic writings in French. It is important to ensure Francophones an equal status before the highest court of Canada.

He therefore asked the next federal government to "commit to making bilingualism one of the required selection criteria for all candidates for appointment to the SCC, equal to merit, excellence and good behavior."

s.21(1)(a)

<sup>1</sup> Rothstein J. (2006) and Moldaver J. (2011).



s.21(1)(a)

s.21(1)(b)

The Commissioner of Official Languages has likewise argued that knowledge of both official languages should be a prerequisite for appointment as a SCC judge. Private Member's Bill C-203, *An act to amend the Supreme Court Act (understanding the official languages)*, introduced by Mr. François Choquette (NDP) on December 9, 2015, proposes to impose a bilingual requirement. Two similar previous private members' bills proposed to impose a bilingualism requirement, one through an amendment to the SCA and one through an amendment to the OLA.<sup>2</sup> Both were defeated. Francophone advocacy groups, as well as media commentators and academics, have also argued for the importance of SCC litigants being heard and understood by the Court in the language of their choice.

While not disputing the importance of linguistic duality on the SCC, opponents of a mandatory bilingualism requirement cite its potential impact on regional representation, particularly from western Canada, and the possible exclusion of otherwise-meritorious candidates.<sup>3</sup>

## CONSIDERATIONS

<sup>2</sup> Former Bill C-208, *An Act to amend the Supreme Court Act (understanding the official languages)*, introduced by Mr. Yvon Godin (NDP) on June 13, 2011, and former Bill C-548, *An Act to amend the Official Languages Act (understanding the official languages — judges of the Supreme Court of Canada)*, introduced by Mr. Denis Coderre (Liberal) on May 15, 2008, respectively.

<sup>3</sup>

a 2011 paper based on survey data suggests that there are significant numbers of judges with bilingual capacity serving on provincial appellate courts outside Quebec. (Overall, 30 of 124 (24%) non-Quebec appellate judges were able to hear cases in French; another 42 (34%) had some knowledge of French; this included 14 (bilingual) and 19 (some French) from the four western provinces.) Grammond, S. and Power, M. 2011. *Should Supreme Court Judges be Required to be Bilingual?* Institute of Intergovernmental Relations, Queens University.

<sup>4</sup>

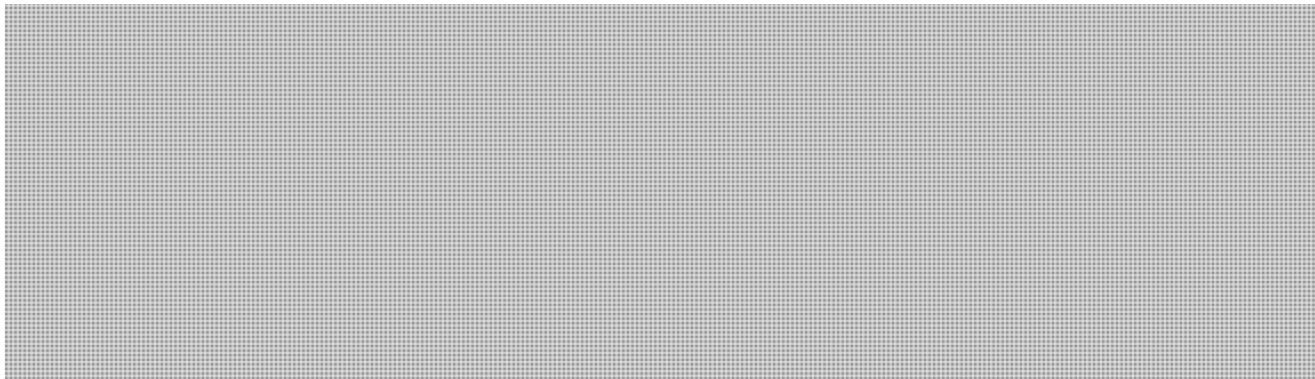
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**21(1)(a), 21(1)(b), 23**

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## CONCLUSION



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## Question Period Note

### SUPREME COURT OF CANADA APPOINTMENTS PROCESS

#### ISSUE:

How will the Government deliver on its commitment to strengthen the process for appointing Supreme Court of Canada justices and ensure new appointees are functionally bilingual?

#### PROPOSED RESPONSE:

- **My mandate letter reflects our Government's platform commitment: to work with all parties in this House and relevant stakeholders to make the process for appointing Supreme Court of Canada judges more transparent, inclusive and accountable.**
- **I look forward to advancing these commitments in the months ahead, and to hearing from parliamentarians and other Canadians.**
- **The Supreme Court is one of Canada's most cherished national institutions, and deserves its outstanding reputation. While the appointment process can be strengthened, merit will remain our touchstone. Fortunately, Canada has a wealth of outstanding jurists from which to draw.**

## BACKGROUND:

The Liberal Party platform, echoed in the Minister's mandate letter, promised that:

We will work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court. This includes proper consultation with the provinces, provincial bar associations, provincial appellate and superior courts, and the Chief Justice of the Supreme Court. This process would also ensure judicial appointments to the Supreme Court are functionally bilingual.

Since 2005, successive governments have used various processes for filling Supreme Court of Canada (SCC) vacancies. Some involved an advisory committee, composed exclusively or partially of parliamentarians, to recommend a short-list of candidates. In one instance, the Minister appeared before a parliamentary committee to explain the government's choice; in other cases, the nominees themselves appeared. For the three most recent appointments, neither an advisory committee nor a parliamentary hearing was used.

In 2004, the House Justice Committee examined the SCC appointment process and recommended both interim and longer-term measures to strengthen transparency and accountability. The dissenting (Conservative) report argued that the majority of recommendations did not go far enough.

There is no current or imminent vacancy on the SCC. The next mandatory retirement will occur in September 2018.

The Commissioner of Official Languages and others have argued for a bilingual requirement for SCC judges, to ensure they can read written pleadings and understand oral arguments in the official language in which they are presented, without the need for translation or simultaneous interpretation. Two related Private Members Bills (PMB) were introduced in recent years, but not adopted: Bill C-548, *An Act to amend the Official Languages Act (understanding the official languages – judges of the Supreme Court of Canada)* introduced in May 2008 and Bill C-208, *An Act to amend the Supreme Court Act (understanding the official languages)* introduced in June 2011. The most recent iteration of this PMB, Bill C-203, was introduced on December 9, 2015 by the NDP member for Drummond, François Choquette.

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Approved by:

Laurie Wright  
Assistant Deputy Minister,  
Public Law Sector

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Note pour la période de questions

**RETRAITE DU JUGE CROMWELL**

**QUESTION :**

Le 22 mars 2016, la Cour suprême du Canada a annoncé que le juge Cromwell prendrait sa retraite le 1<sup>er</sup> septembre 2016. Le gouvernement devra établir un processus pour la sélection de son remplaçant. La Cour souhaitera qu'un nouveau juge soit nommé à temps pour sa session d'automne.

**RÉPONSE PROPOSÉE :**

***Retraite du juge Cromwell :***

- Je remercie le juge Cromwell pour les services distingués qu'il a rendus au Canada, tant au sein de la magistrature qu'à l'extérieur. Il a apporté des contributions remarquables à sa profession tout au long de sa carrière, tant à titre de professeur qu'à titre de juriste.
- Au cours des dernières sept années et demie, il a apporté un point de vue réfléchi et pratique à son travail à la Cour suprême. Il fut également un chef de file national dans le dossier de l'accès à la justice.
- J'en aurai davantage à dire à ce sujet dans les semaines à venir. Entre-temps, je remercie le juge Cromwell pour ses services et je lui souhaite la meilleure des chances.

***Si des questions sont posées sur le processus de nomination :***

- Comme l'indique ma lettre de mandat, notre gouvernement travaillera en collaboration avec toutes les parties à la Chambre des communes pour veiller à ce que le processus de nomination des juges de la Cour suprême soit transparent et inclusif et permette de rendre des comptes à la population canadienne.
- En outre, nous sommes résolus à consulter les intervenants pertinents, et nous nous assurerons que le successeur du juge Cromwell est bilingue à un niveau fonctionnel.

## BACKGROUND:

On March 22, 2016 the Supreme Court of Canada announced that Justice Thomas Cromwell will be retiring from the court effective September 1, 2016. The Court will wish for an appointment to occur ideally in time for its fall session, which commences October 3, 2016.

The Liberal Party platform, echoed in the Minister's mandate letter, promised that:

"We will work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court. This includes proper consultation with the provinces, provincial bar associations, provincial appellate and superior courts, and the Chief Justice of the Supreme Court. This process would also ensure judicial appointments to the Supreme Court are functionally bilingual."

Since 2005, successive governments have used various processes for filling Supreme Court of Canada (SCC) vacancies. Some involved an advisory committee, composed exclusively or partially of parliamentarians, to recommend a short-list of candidates. In one instance, the Minister appeared before a parliamentary committee to explain the government's choice; in other cases, the nominees themselves appeared. For the three most recent appointments, neither an advisory committee nor a parliamentary hearing was used.

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The Commissioner of Official Languages and others have argued for a bilingual requirement for SCC judges, to ensure they can read written pleadings and understand oral arguments in the official language in which they are presented, without the need for translation or simultaneous interpretation. Two related Private Members Bills (PMB) were introduced in recent years, but not adopted: Bill C-548, *An Act to amend the Official Languages Act (understanding the official languages – judges of the Supreme Court of Canada)* introduced in May 2008 and Bill C-208, *An Act to amend the Supreme Court Act (understanding the official languages)* introduced in June 2011. The most recent iteration of this PMB, Bill C-203, was introduced on December 9, 2015, by the NDP member for Drummond, François Choquette.

## PERSONNES-RESSOURCES :

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## Question Period Note

### RETIREMENT OF JUSTICE CROMWELL

#### ISSUE:

On March 22, 2016, the Supreme Court of Canada announced Justice Cromwell's retirement, effective September 1, 2016. The Government will need to establish a process for the selection of his replacement. The Court will wish an appointment in time for its fall session.

#### PROPOSED RESPONSE:

##### *Retirement of Justice Cromwell:*

- I thank Justice Cromwell for his distinguished service to Canada, both on and off the Bench. He has made remarkable contributions to the law and to the profession throughout his career, both as a professor and a jurist.
- Over the past seven and a half years, he has brought a thoughtful and practical perspective to his work on the Supreme Court. He has also been a national leader on access to justice.
- I will have more to say on this in the weeks ahead. In the meantime, I thank Justice Cromwell for his service and wish him the best.

##### *If Pressed on Appointment Process:*

- As stated in my mandate letter – our Government will work with all parties in the House of Commons to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians.
- As well, we are committed to consulting with relevant stakeholders. And we will ensure that Justice Cromwell's successor is functionally bilingual.



## BACKGROUND:

On March 22, 2016 the Supreme Court of Canada announced that Justice Thomas Cromwell will be retiring from the court effective September 1, 2016. The Court will wish for an appointment to occur ideally in time for its fall session, which commences October 3, 2016.

The Liberal Party platform, echoed in the Minister's mandate letter, promised that:

"We will work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court. This includes proper consultation with the provinces, provincial bar associations, provincial appellate and superior courts, and the Chief Justice of the Supreme Court. This process would also ensure judicial appointments to the Supreme Court are functionally bilingual."

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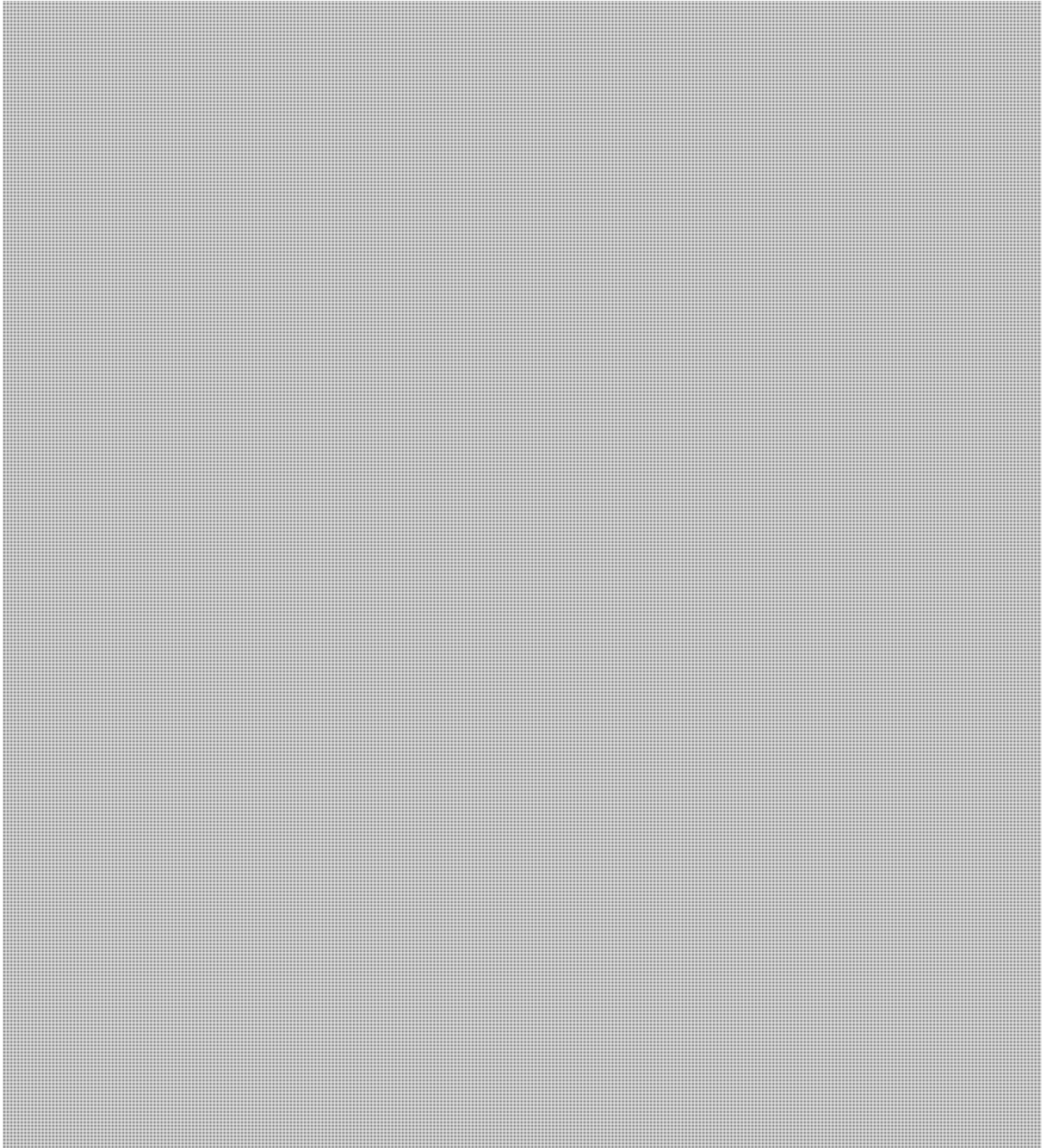
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s.69(1)(e)

**TITRE/TITLE: Supreme Court of Canada Appointments Process**



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**69(1)(e)**

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**TITRE/TITLE: Supreme Court of Canada Appointments Process**



Soumis au CM/Submitted to MO: May 3, 2016

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FOR APPROVAL

NUMÉRO DU DOSSIER/FILE #: 2016-012951

COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected B

**TITRE/TITLE: Supreme Court of Canada Appointments Process – Engagement Approach  
and Documents**

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## Fiche d'approbation Approval Slip

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DOSSIER/FILE # 2016-015029

Objet / Subject: SCC Appointment Process

Préparée par /  
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Personnel de soutien /  
Administrative personnel: Brigitte Roy

Cote de sécurité /  
Security level: Protected B  
Numéro de téléphone /  
Telephone number: 941-3330

Nombre de pièces jointes /  
Number of attachments:

Date limite à l'ULM /  
Due at MLU:

Soumise pour approbation à  
Sector approvals as required

Initiales Initials	Année Year	Mois Month	Journée Day
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ADAIR CROSBY, A/General Counsel and Director, JACTP

<u>AC</u>	<u>2016</u>	<u>07</u>	<u>04</u>
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13 LAURIE WRIGHT, Assistant Deputy Minister, PLLSS

<u>LW</u>	<u>2016</u>	<u>07</u>	<u>04</u>
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Équipe du SM / DM-Team

Approbation/signature/examen du ministre demandé pour le :  
Minister's signature/approval/review requested by: \_\_\_\_\_

Remarques / remarks: \_\_\_\_\_  
\_\_\_\_\_  
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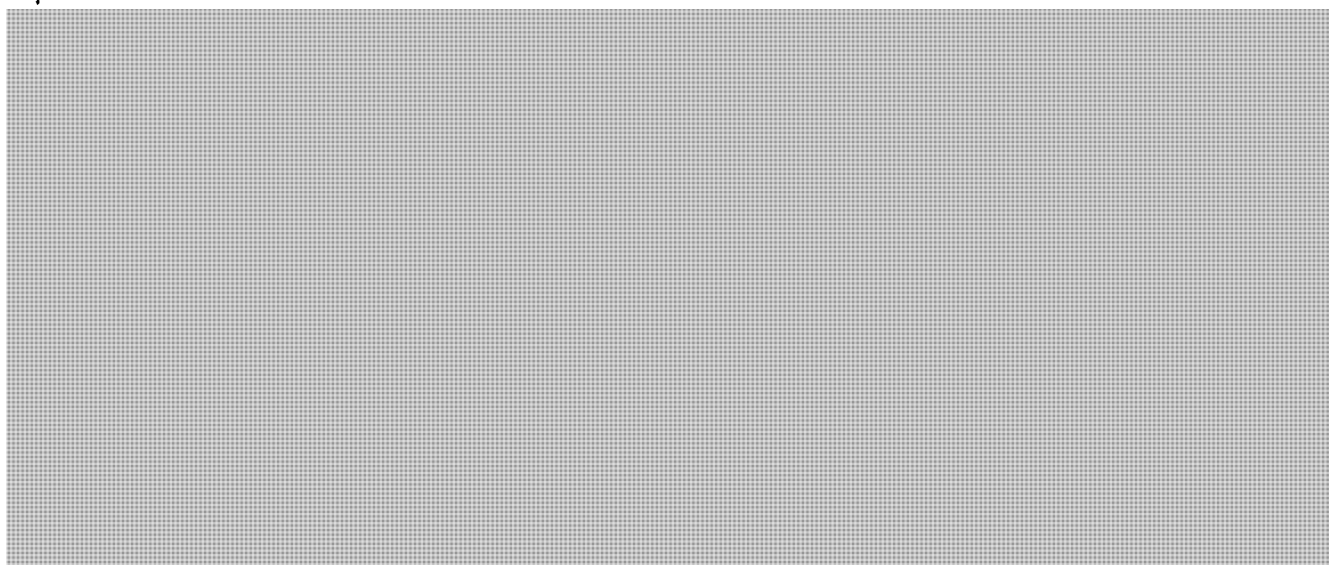
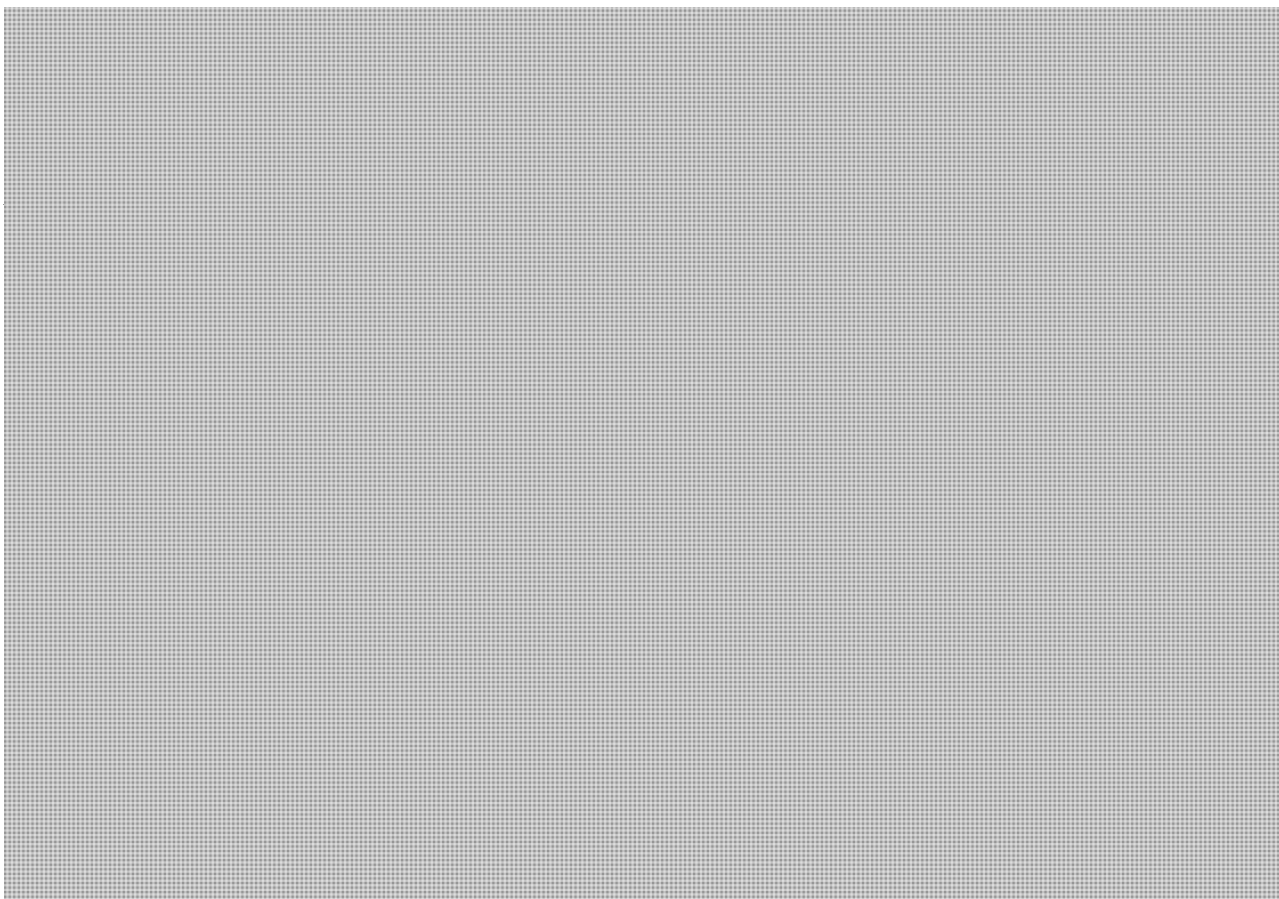
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s.69(1)(g) re (a)

## Supreme Court of Canada Appointments Process



s.21(1)(a)

**s.21(1)(a)**

**Subject:** FW: SCC appointment : Reading for the Minister

Minister: here are some background pieces on SCC appointment processes, bilingualism and diversity,

Bill

As requested earlier today, please find enclosed suggested reading material for you to provide the Minister on the issue of SCC appointment process compiled by Public Law Sector.

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2009

## Should Canada Have A Representative Supreme Court?

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# **SPECIAL SERIES ON THE FEDERAL DIMENSIONS OF REFORMING THE SUPREME COURT OF CANADA**

## **Should Canada Have a Representative Supreme Court?**

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## INTRODUCTION<sup>1</sup>

Should Canada have a representative Supreme Court? While the idea has an undeniable appeal, and is received wisdom in a variety of institutional settings in the public sphere (the federal public service, for example, is committed to becoming a representative institution), it sparks some questions. What groups or values should judges represent and how should they represent them? By what criteria should representation be assessed and in whose eyes? Finally, what does representation mean to and for the Supreme Court, and those affected by its decisions?

This set of interlocking questions must be asked against the backdrop of two broader debates in Canada – one surrounding judicial appointments and the other involving the evolving law of bias in judicial decision-making. In other words, the value we assign identity and experience of Supreme Court justices cannot be disentangled from how we appoint them, or from how we understand judicial impartiality more broadly.

In this essay, I elaborate on the questions set out above and focus on the relationship between a representative court, judicial appointments and bias. My analysis is in three parts. In the first part, I explore Canada's increasing multicultural make-up, the rationales for a Court that reflects the diversity of Canadian society, and the current approach to representation on the Supreme Court of Canada. In the second part, I consider the relationship between a representative court and judicial impartiality, with particular focus on the Supreme Court's decision in *R. v. R.D.S.* in 1997. Finally, in the third part, I examine the relationship between representation and judicial appointments.

I conclude that the Supreme Court, for reasons tied both to democratic legitimacy and the quality of adjudication, ought to be composed of people with a mix of identities and experiences that broadly reflects the Canadian experience. This shift to value identity and experience more transparently may mean that, in years to come, the Court will and should "look" different than it now does, but in order to achieve a genuinely reflective Court, we will need both a broader and a deeper conception of diversity. Further, as part of this conceptual shift, we will need to develop along the way a broader and deeper understanding of judicial impartiality and the judicial appointment process.

## PART ONE: TOWARD A REPRESENTATIVE SUPREME COURT?

Canada has been transformed from a society with predominantly European roots into one that embraces many cultures and traditions. One Canadian in nine is a member of a visible minority group and more than half of the residents of Canada's largest city, Toronto, were born outside Canada or are from a visible minority community. There are more than ninety different ethnic groups in the Toronto Census Metropolitan Area (CMA) and over one million non-English or French speaking people. The top six ethnic groups in Toronto include: European (997,180), East and Southeast Asian (488,350), British (457,990), Canadian (311,965), South Asian (291,520) and Caribbean (167,295).

In the 1996 census, visible minorities in Canada numbered more than three million. Two million came as immigrants; one million are Canadian by birth. As a result, a variety of private and public institutions has had to grapple with the question of whether particular communities are over or underrepresented in their workforces. A federal government report emphasized that the federal public

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<sup>1</sup> This paper was prepared for the Queen's Institute of Intergovernmental Relations (IIGR) Working Paper Series on the Supreme Court of Canada. My analysis builds on earlier examinations of a representative public service in L. Sossin, "Discretion and the Culture of Justice" (2006) *Singapore Journal of Legal Studies* 356-384; and of the judicial appointments process in L. Sossin, "Judicial Appointment, Democratic Aspiration and the Culture of Accountability" (2008) 58 *University of New Brunswick Law Journal* 11-43. I am grateful for the superb research assistance of Daniel Saposnik and Vasuda Sinha.

service is supposed to serve all Canadians, yet its workforce does not reflect the diversity of the Canadian population. The report pointed out that visible minorities are under-represented and that, in 1999, only one in 17 employees in the federal public service was a member of a visible minority group and that visible minorities are almost invisible in the management and executive categories (one in 33).<sup>2</sup>

Visible minorities, of course, represent only one of many communities of identity that one might wish to see reflected on the Supreme Court (a Court which, to date, has not had an appointment from a visible minority community). I believe it is important at the outset to address what we might mean by diversity when it comes to the composition of the Supreme Court.

As discussed below, the overarching priority for the government in Supreme Court appointments is regional diversity, driven in part by the statutory requirement to appoint at least three judges from Quebec. Regional diversity also is a proxy for linguistic diversity (at least between anglophones and francophones).

Since the enactment of the *Charter*, and the appointment of Bertha Wilson as the first woman on the Supreme Court in 1982, gender representation has become a consistent factor in discussions of a representative Court. The focus on gender was no doubt intensified by the engagement of the Court with a series of high-profile *Charter* and human rights cases involving equality rights relating to gender. While focusing on barriers of gender in society, it was natural for the court to pay more attention to barriers in the legal profession and the underrepresentation of women on the bench generally and on the Supreme Court in particular. By 2004, four out of the nine justices were women and Beverley McLachlin had been appointed Chief Justice of the Court. The logic between the subject matter of the Court's decision-making and a focus on its composition is not always straightforward. While the Court has championed gay and lesbian rights under the *Charter*, for example, no similar scrutiny has been brought to bear on the sexual orientation of Supreme Court justices.

Religion remains a controversial community of identity for a host of reasons. As a secular institution of government, there is no obvious reason why the religious affiliation or beliefs (which may not be the same!) of Supreme Court justices should be relevant. That said, because religious approaches to morality and justice parallel aspects of the legal system so closely, it would be disingenuous to suggest religion has nothing to do with judging. Further, religious communities often overlap and interact with communities of ethnicity. In an aboriginal context, for example, spiritual beliefs cannot easily be disentangled from community identity.

Other kinds of identity change over time. For example, by definition, every Supreme Court justice was once young but no longer is at the time of her or his appointment. Does the experience of youth mean justices tend to have the ability to identify with the problems of youth, or does the distance from this experience mean justices lack this ability? The same might be said of a judge's socioeconomic status. While some may have grown up or lived part of their life in poverty, this is by definition not the case once an individual is appointed to the Supreme Court and is thereby the recipient of an annual salary in the range of \$300,000.

Importantly, there are also communities of identity that remain largely hidden, but which may reflect important experiences for a representative Supreme Court to draw upon. For example, having had exposure to mental illness such as depression or schizophrenia or people suffering from trauma related disorders could well provide rich insight for a judge, but many may choose not to disclose this experience. Growing up in poverty or emotional deprivation similarly shape identity but in ways that are difficult to measure. People also may choose not to identify with a community of identity. Someone born into a religious community may decide to have no connection to that community later in life. Someone

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<sup>2</sup> *Ibid.* at 20.

with a physical disability may choose not to view themselves as disabled or identify in any way with others who share a similar condition.

Any concept of a representative or reflective Supreme Court has to confront the almost infinite complexities of pluralism both within and between communities of identity. This complexity includes both intersectionality (some people might both be members of a visible minority and a religious majority, or be at once transgendered and disabled), and individuality (no category or categories of identity can capture all of the unique experiences and perspectives that make every person an individual). For both groups, identity may be a dynamic rather than a static phenomenon, and the very act of attempting to "categorize" a person may be perceived as illogical and even offensive.

Finally, it is important to clarify that not all communities of identity need be treated or valued in the same way. Membership in majority communities may be less important for the Court to "reflect" than minority or marginalized communities. While there undoubtedly will be intense scrutiny of the experience of the first South-Asian or African-Canadian Supreme Court justice, few would suggest that an additional "white" perspective is important to the Court.

The purpose of the above discussion is not to settle on a definitive meaning of diversity or the categories which will or should "count" for purposes of achieving a representative Supreme Court. Rather, my comments are intended to hint at why a broader and deeper approach to diversity is needed, one that accommodates both the aspects of people that we can see and those we cannot. Like Canadian society, the Supreme Court ought to be seen as a complicated, evolving and heterogeneous community. To the extent that the composition of the Court has failed to keep pace with the changes in Canadian society, in my view, we should view this as a deficiency to be remedied.

Beyond attempting to broaden and deepen what we take diversity to mean, I believe it is also important to understand why a court should reflect the diversity of society. Do we, and should we, expect the decisions reached by a representative judiciary to differ from the decisions reached by an unrepresentative judiciary (or a judiciary selected without representation in mind)? Would a representative Court be any less valuable if it turned out not to lead to any measurable difference in outcomes than a homogenous Court? Is the ideal of a representative Court symbolic, substantive or a little of each?

It is to the rationales for a representative court in a multicultural society that I now turn.

### ***A. The Rationales for a Representative Court***

Liberal democracy is built on the claim that public institutions should be inclusive,<sup>3</sup> and is tied directly to the aspiration of "government by the people."<sup>4</sup> This interest in a barrier-free route of entry into the judiciary is of particular concern in Canada, as for many decades the Canadian judiciary was a vehicle for social exclusion.<sup>5</sup>

<sup>3</sup> For a review of this trend, see Vidu Sonhi, "A Twenty-First Century Reception for Diversity in the Public Sector: A Case Study" (2000) 60 *Public Administration Review* 395.

<sup>4</sup> See for a classic statement of this argument, Frederick C. Mosher, *Democracy and the Public Service*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1968).

<sup>5</sup> See James Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985); and Paul C. Weiler, *In the Law Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974).



The removal of barriers, however, is not the same as the proactive commitment to a representative judiciary. An actively representative court implies that judges will actively "represent" the interests, values or representativeness of their community. A passively representative court suggests that judges would not seek to represent their communities but that demographic proportionality is a good in and of itself.<sup>6</sup> Many proponents of passive representation, however, assume that active representation is a likely consequence of such changes to the make-up of the judiciary. Whatever the relationship between the two, the tension between passive and active representation in the judiciary raise important issues as to the rationale of a representative court.

1. *Fairness: The exercise of adjudication should reflect values of the community.*

A compelling rationale for a judiciary that reflects society is that fair adjudication requires it. Judicial decision-making calls on judges to determine who is credible, what would shock the conscience of Canadians, what would bring the administration of justice into disrepute, what limitations on rights are justified in a free and democratic society, just to name a few. These sorts of subjective determinations ought to reflect the community's mix of identities and experiences. Fairness in a pluralist society, in other words, requires pluralist decision-making.

2. *Reasonableness: The more perspectives and backgrounds included in public decision-making, the more reasonable those decisions will be.*

On this rationale, related to the fairness of decision-making, different voices and perspectives will help refine and improve the quality of judicial decision-making.

This rationale reflects the claim that a representative judiciary will adjudicate in a more compassionate, empathetic and effective manner than a judiciary that is not representative. This claim is particularly apposite in the context of appellate adjudication which makes decisions as panels, where judges must deliberate and craft decisions collaboratively.<sup>7</sup> Thus, one can see the fact that the Supreme Court sits as a bench of 5, 7 or 9 as an indication that pluralist perspectives are valued. A homogenous bench reflecting the same identities and experiences would defeat the purpose of this appellate structure.

3. *Equality: In a society devoted to the constitutional value of equality, courts should be responsive to the ethnic, cultural and gender composition of the population it serves.*

Whether or not a difference in the Court's make-up leads to any apparent difference in its decision-making, a representative Court still may be justified on grounds of democratic legitimacy and equity.<sup>8</sup> In a democratic society with an aversion to discrimination, we should expect the Court to reflect society. Therefore, where there is no substantive difference in suitability for the judicial role, as in the case of gender, underrepresentation is presumptively a concern. This factor is amplified by the fact of

<sup>6</sup>For one of the first studies to focus on this distinction, see David Rosenbloom & Jeanette Featherstonhaugh, "Passive and Active Representation in the Federal Service: A Comparison of Blacks and Whites" (1977) *Social Science Quarterly* 873.

<sup>7</sup>Sonia Lawrence, "Reflections on Judicial Diversity and Judicial Independence" (2008), citing also Harry T. Edwards, "The Effects of Collegiality on Judicial Decision, Making", (2003) 151 *U. Pa Law Rev.* 1639; and Lewis A. Kornhauser & Lawrence G. Sager, "The One and the Many: Adjudication in Collegial Courts" (1993) 81 *Cal. Law Rev.* 1.

<sup>8</sup> See Kate Malleson, "Justifying Equality on the Bench: Why Difference Won't Do" (2003) 11 *Fem. Legal Stud.* 1.

political accountability of the government for its judicial appointments. Since governments are accountable for their appointments to the Supreme Court, if that Court fails to resonate with the public, it is the government that pays a political price.

While political accountability may suggest an inclination to reflect majority will, as with the development of the constitutional ideal of equality under section 15 of the *Charter*, we should also be more concerned with representation of disadvantaged and disenfranchised minorities. In other words, the underrepresentation of otherwise disadvantaged or marginalized groups will merit remedial measures more than the underrepresentation of otherwise privileged groups. Whether or not members of underrepresented groups bring fresh and different perspectives to these kinds of decision-making settings, if groups are underrepresented in the judiciary, this may undermine public confidence in these critically important judgments. Underrepresentation may be particularly damaging in minority communities which are otherwise discriminated against, vulnerable or marginalized.

4. *Minority Rights: The Court's commitment to the protection of minority rights and reconciliation between communities through constitutional interpretation is enhanced by a Court with first-hand experience with the minority/outsider experience.*

Entry of its members into the judiciary is a tangible sign of enfranchisement for minority groups, especially new immigrant communities. Beyond its symbolic significance, it is also a tangible conduit of social mobility for many groups who confront discrimination, exclusionary requirements or other barriers in society. As Sonia Lawrence has observed, "we cannot ignore the connection between the judiciary and the other hierarchies which mark our society without allowing the judiciary to be a(nother) symbol of hierarchy through difference, another marker of where power resides in terms of colour, ethnicity and gender."<sup>9</sup>

For Lawrence, the bench is another example of persistent exclusion, and as such it may undermine the confidence of the public, particularly those sections that are unrepresented.<sup>10</sup> In other words, if the consequences of a homogenous bench could include a loss of faith in the ability of the courts to deliver fair and impartial justice, this creates a clear and important role for diversity on the bench in establishing and maintaining judicial independence.

## Conclusion

As I have attempted to show, these rationales raise significant questions and concerns which are rarely the subject of serious debate. In Canada, at least, the aspiration for a representative judiciary has become an article of faith tied to support for multiculturalism. To agree with the aspiration, however, is not necessarily to subscribe to any or all of these rationales. Yet the rationales, it seems to me, are as important as the aspirations (and in some cases may be more so). Depending on which of these rationales predominates, one may develop more passive or more active expectations of how representation will influence discretionary decision-making.

In the analysis below, I explore this apparent dichotomy and suggest problems in viewing representativeness only through passive or active lenses. In areas where discretion turns on value structures, administrative culture and empathy, this bright line becomes decidedly blurred. Here, the question is not *whether* decision makers represent particular viewpoints, perspectives and preferences but simply *which* viewpoint, perspective and preference is given priority and *why*, and how a justice system

<sup>9</sup> Sonia Lawrence, "Reflections on Judicial Diversity and Judicial Independence" (2008).

<sup>10</sup> Sherrilyn A. Ifill, "Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts" (1997) 39 B.C. L. Rev. 95 at 98.

committed to transparency ought to address the ways in which the humanity of decision makers informs their judgments.

### ***B. Representation and the Supreme Court of Canada***

The Supreme Court is distinct among Canadian courts in that appointments to it already are based on representative principles, at least in limited ways. The point of departure for representation on the Supreme Court is regionalism. By virtue of s.6 of the *Supreme Court Act*, at least three judges must be appointed from Quebec. While the principle underlying this provision appears to be to ensure a sufficient number of judges are proficient in the Civil Law of Quebec, there may be other goals which this requirement serves – for example, to ensure at least a component of the Court has been exposed to issues of minority rights protection inherent in the Quebec experience. Because three of the nine judges on the Court will come from Quebec, the Government has recognized the principle of regional representation more broadly, roughly in correlation to population. As a result, in addition to the three judges from Quebec, the Court will also have three judges from Ontario, one judge from the Atlantic Provinces (with a loose understanding that the appointment should rotate between provinces, so that with the retirement of Justice Michel Bastarache from New Brunswick in 2008, the Government appointed Justice Tom Cromwell from Nova Scotia), one judge from British Columbia, one judge from the other Western provinces (Alberta, Saskatchewan and Manitoba).

While regionally diverse,<sup>11</sup> the Court historically was criticized as overwhelmingly homogenous. As Peter McCormick observed, "For most of the Court's history, the basic characteristics of its justices were easily described: They were middle-aged (or older) white professional males of British or French ethnicity."<sup>12</sup> Writing in the 1970s, Paul Weiler stated bluntly that, "The most obvious limitation in the membership of the Supreme Court is that it is an all-male society."<sup>13</sup>

Because regional representation has been valued so highly, other forms of representation may have received too little attention. The exception to this rule has been those identity characteristics closely tied to regional representation (i.e. linguistic community and religion). For example, at least one of the non-Quebec judges historically has been francophone (examples would include LeDain, La Forest, Arbour, Bastarache, and most recently Charron).<sup>14</sup> A similar proxy-regional concern was the mix of Catholic and Protestant Supreme Court justices. It was therefore noteworthy when the first Jewish judge (Bora Laskin), was appointed in 1970. Justice Fish became the second Jewish member of the Supreme Court in 2004, joined by Abella later the same year, and subsequently by Marshall Rothstein in 2008. The first woman, Bertha Wilson, was appointed as discussed above in 1982, and has been followed by L'Heureux-Dubé in 1987, McLachlin in 1989, Arbour in 1999, Deschamps in 2003, Abella in 2004, and Charron in 2004. John Sopinka, a Ukrainian-Canadian, was (apart from Laskin) the first person appointed who was not clearly of British or French descent, and Frank Iacobucci, an Italian-Canadian, was the second.

<sup>11</sup> It is necessary to qualify the degree to which even regional diversity has been achieved. Important constituencies within the federation remain unrepresented, notably Canada's three territories (Yukon, Northwest Territories and Nunavut). Additionally, the province of Newfoundland which entered Canada sixty years ago still has not had a Supreme Court judge.

<sup>12</sup> Peter McCormick, "Selecting The Supremes: The Appointment Of Judges To The Supreme Court of Canada" *Journal of Appellate Practice and Process* (Spring, 2005).

<sup>13</sup> Paul C. Weiler, *In the Law Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974) at 18.

<sup>14</sup> The reverse convention--that one of the Quebec judges would be an anglophone--seemed to have gone into suspension after the 1954 appointment of Abbott, but may have been revived by the 2004 appointment of Fish.

While the diversity of the Court has clearly been enhanced over the past three decades, particularly with respect to the categories indicated above, the Court remains distinctively and remarkably homogenous. The Court has yet to have a justice from the aboriginal community, or someone not born into a Judeo-Christian religious culture, or from a racialized or visible minority community or openly homosexual. In this sense, at first glance, the Supreme Court appears markedly out of step with the rapidly evolving heterogeneity of Canadian society.

As discussed above, assessing the representative nature of the current Supreme Court is not as simple as a roll count of ethnicity, gender, religion or linguistic identity. Chief Justice McLachlin was born into a small-town community in Alberta, while Justice Abella was born into a displaced persons camp in Germany. Are these experiences not as formative as the various identity communities into which those judges might claim membership?

The discussion above on the rationales of a representative court becomes important in this context. If our concern is a diverse range of perspectives on the substantive issues which face the Court, we might privilege judges with diverse experience even if they are members of majority communities. If the more compelling rationale for a representative court is visual – that society see a Supreme Court that “looks like them” – then identity communities might take precedence even if this results in homogeneity of experience (e.g. judges from diverse ethnic communities who went to the same schools, practiced in the same firms, lived in the same neighbourhoods and enjoyed the same privileges). Clearly, experience may count as much as identity when it comes to the factors that shape a representative Court.

The question underlying the distinction between identity and experience may be which has a significant role in shaping judicial decision-making? The answer is certainly “both”.<sup>15</sup> The relationship between identity and decision-making, however, is neither linear nor one-dimensional. Some have argued (myself included) that members of the Supreme Court have viewed the development of constitutional rights through the prism of their own life experiences.<sup>16</sup> Yet, at the same time, it would be difficult to sustain the argument that the judges have been unable to reach beyond their own experiences in the application of Canadian law, and in particular the *Charter of Rights and Freedoms*. A Court had no member with aboriginal roots and yet was able to recognize aboriginal rights and value the aboriginal perspective in cases such as *Calder* and *Sparrow*.

While the identity of a judge does not dictate how that judge will decide any particular case, or even a class of cases, it arguably does affect the ideal of impartiality to which all judges aspire. It is to that question that I now turn.

## PART TWO: REPRESENTATION & JUDICIAL IMPARTIALITY

The puzzle of a representative judiciary is that we want a diverse bench because their more varied experience will enhance judicial decision-making, and yet we worry about a representative judiciary

<sup>15</sup> The first significant attempt to address this question from the standpoint of a Supreme Court judge was Bertha Wilson, “Will Women Judges Make a Difference ?” (1990) 28 Osgoode Hall Law Journal 507. See also Regina Graycar, “The Gender of Judgments: An Introduction” in Margaret Thornton, ed., *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) 262 ; Brenda Hale, “Equality and the Judiciary: Why Should We Want More Women Judges” (2001) P.L. 489 ; and Judith Resnick, “On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges” (1987–1988) 61 S. Cal. L. Rev. 1877.

<sup>16</sup> See L. Sossin, “Towards a Two-Tier Constitution? The Poverty of Health Rights” in *Access to Care, Access to Justice: The Legal Debate on Private Health Insurance in Canada* (Colleen Flood, Kent Roach & Lorne Sossin, eds.) (Toronto: University of Toronto Press, 2005).

precisely because it may mean judges will decide based on their identity or community affiliation rather than based on the facts and law before them.

The absence of bias is sometimes referred to as an independent procedural entitlement, but in Canada, the Supreme Court has made clear that it should be understood as a further aspect of the duty of fairness.<sup>17</sup> It is not necessary to establish actual bias in order to invalidate a judicial decision. Rather, the requirement is to demonstrate a mere reasonable apprehension of bias. The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."<sup>18</sup>

The standard for reasonable apprehension of bias, as with the other aspects of procedural fairness, will vary according to the context and the administrative decision-maker involved, so that it differs, for example, for a judge in a court and a judge appointed as a Commissioner of a public inquiry.<sup>19</sup>

The originating principle of bias is that a decision-maker should not decide her or his own case. A reasonable apprehension of bias may arise when a party or witness is related to the judge. Relationships may be of a personal, professional or business nature. The issue is whether the relationship is such that a reasonable person might fear the decision-maker would not approach the matter with an open mind. As a result, not every relationship will result in a reasonable apprehension of bias. In the case of a purely professional association, for example, the associated tribunal might not rise to this standard if tribunal members are normally drawn from among the ranks of the profession in question. Judges may hear cases, for example, argued by lawyers who were once their partners. The courts have confronted only incidentally the question of whether membership in a particular cultural, racial, ethnic or linguistic group could give rise to a reasonable apprehension of bias. Judges address this issue individually when deciding if they need to recuse themselves from a particular matter. The failure to recuse in circumstances where the impartiality of the judge, and therefore the fairness of the hearing is in doubt, can lead both to grounds for reversing the decision on grounds of bias and potentially to a disciplinary proceeding against the judge for unethical conduct.<sup>20</sup>

The Supreme Court considered these issues most squarely in the context of *R.D.S. v. The Queen*.<sup>21</sup> In that case, the trial judge (who was African-Canadian), was hearing a case involving an African-Canadian

<sup>17</sup> See, for example, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 849.

<sup>18</sup> [1978] 1 S.C.R. 369 at 394; this test was adopted in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, *infra*, discussed at 496 per Major J., 502 per L'Heureux-Dubé and McLachlin JJ. and 530-531 per Cory J.

<sup>19</sup> See *Chretien v. Canada*, 2008 FC 802. See also *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.

<sup>20</sup> A decision which gave rise both to a reversal and a disciplinary proceeding involved Justice Matlow. He participated in a decision quashing a City of Toronto construction project. Based on a conflict of interest arising from Justice Matlow's opposition to a construction project in his neighbourhood, the decision in which Justice Matlow participated was reversed, and an Inquiry into his ethical conduct was undertaken by the Canadian Judicial Council – see [http://www.cjc-ccm.gc.ca/cmslib/general/Matlow\\_Docs/Final%20Report%20En.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/Matlow_Docs/Final%20Report%20En.pdf).

<sup>21</sup> *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 ("*R.D.S.*").

youth who was charged with assaulting a police officer. The only two witnesses at trial were the accused himself and the police officer. The police alleged that the youth had resisted arrest and become violent towards him. The youth alleged that he had been the subject of threats of violence at the hands of the police officer. Their accounts of the relevant events differed widely and the case turned on credibility. The trial judge indicated that she had a reasonable doubt about the accused's guilt even without accepting the evidence of the accused with respect to the conduct of the police officer. She concluded that the Crown had not discharged its evidentiary burden to prove all the elements of the offence beyond a reasonable doubt. The trial judge elaborated on her findings with the following comments:

The Crown says, well, why would the officer say that events occurred in the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

The case reached the Supreme Court on the question of whether these comments gave rise to a reasonable apprehension of bias—a divided Court issued four separate sets of reasons. Writing for the majority judgment on this issue, Cory J. observed:

The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes... True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. [Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.] It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. *The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.* See for example the discussion by The Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997), C.J.W.L. 1. See also Devlin, *supra*, at pp. 408-409.<sup>22</sup> (Emphasis added.)

In the context of this case, Cory J. held that the comments by the trial judge were "unfortunate", "worrisome" and "come very close to the line" but when considered in light of the submissions and evidence in the case, did not in his view give rise to a reasonable apprehension of bias.<sup>23</sup>

Three judges of the Court dissented and found the comments did create a reasonable apprehension of bias, as it suggested factors not in evidence influenced the trial judge's determination of credibility. The two female judges of the nine member court, Justice McLachlin (as she then was) and Justice L'Heureux-Dubé, concurred with Cory J. in the result, but would have gone even further in condoning the comments of the trial judge, asserting, "An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context... : A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality."<sup>24</sup>

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<sup>22</sup> *Ibid.* at para. 119-120.

<sup>23</sup> *Ibid.* at para 152.

<sup>24</sup> *Ibid.* at paras. 44-45.

Thus, when one takes stock of the various concurring and dissenting judgments in the case, the majority of the Court found that the comments did not constitute a reasonable apprehension of bias, but that majority split on the question of whether it was desirable and appropriate that the trial judge refer to her own "personal understanding and experience of the society" in which she lived and worked. When combined with the dissenting judges who concluded the comments were both inappropriate and reflected bias, this led to the majority view in the case being, first that the comments did not render the decision legally invalid, but second, that it would have been preferable had the trial judge not addressed the social context surrounding that assessment in her reasons.

If judges follow the direction provided by a majority of the judges in *R.D.S.*, we arguably would be left with a situation where judges were encouraged to draw on identity and experience in their decision-making but then required to explain those decisions on other grounds. We would, in other words, learn little about the influence of identity and experience on the content of judging.

The *R.D.S.* approach would impair the development of a judicial and public dialogue about the kinds of identity and experience related factors which ought to shape judgments, and those which ought not to do so. If judges rely on these factors to shape their decisions, but make no mention of them in their reasons, it may be difficult if not impossible to refine which kinds of experiences are appropriate to use and which might create a reasonable apprehension of bias. For example, if a judge has a child with special needs, should that judge sit on a case dealing with a constitutional challenge to underfunded programs for children with special needs? On the one hand, that judge will have special insight into the facts and issues raised in the case, and her judgment may be enriched by such insight. On the other hand, because the judge may be personally affected by the decision, would a reasonable person likely conclude that the judge could not be unbiased? If a parent of a child with special needs should not sit on a case involving funding for children with special needs, should only childless judges sit on cases dealing with public schools? At some point along the spectrum of judicial impartiality, we reach a point where identity and experience cannot be said to create bias, but without transparency in judicial decision-making, this spectrum will remain opaque.

Clearly, identity and experience have always influenced judging (even if this mostly has meant that the identity of being a member of the dominant community and the experience of privilege has shaped the judicial mindset), especially in contexts of credibility assessments. Yet, judges have rarely acknowledged the ways in which such cultural factors affect their decision-making - so, the prevailing view in *R.D.S.* simply restates and affirms the status quo.

Perhaps ironically, the decision that reflected the resilience of the status quo also set in motion significant change. One aspect of that change was a program initiated by the National Judicial Institute to educate the Canadian judiciary on "social context." While controversial at the start, social context programs have become a well accepted part of judicial education, which enable judges to reach beyond their own experience.<sup>25</sup>

While there is arguably significant support for the move to a representative judiciary, and a judiciary with an understanding of social context beyond their own experience, there is real ambivalence surrounding what difference such a shift would generate. What *R.D.S.* and its debate about the nature of bias disclose is the difficult balance required in decision-making settings between identity and merit. Traditionally, these concepts are seen in tension with one another. To the extent we privilege identity and seek a Supreme Court that is representative, merit matters less; and, to the extent merit is the sole driver

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<sup>25</sup> See Rosemary Cairns Way, "Contradictory or Complementary? Reconciling Judicial Independence with Judicial Social Context Education (2008) (on file with the author)

of appointments, identity recedes as a priority. But need these concepts be oppositional? Should a candidate's familiarity with another perspective or set of life experiences itself be an element of merit? As Lizzie Barnes observes:

There is no doubt that reconfiguring our understandings of merit is as difficult as that of complicating notions of identity. But without a shift in this regard, the transformative capacity of any step will be limited. If we do not believe the diverse ways of living produce diverse skills and abilities, we are never going to entrust important decision-making power to groups composed of people from a diversity of backgrounds.<sup>26</sup>

It is against this backdrop of the tension between objective merit and subjective identity that the selection process for Supreme Court justices emerges as a critical issue in reconciling the various aspirations we have for the Supreme Court. We need the Court to serve as an expression of democratic will and as an expression of counter-majoritarian protection for minority rights. Walking this particular tightrope is a quintessentially Canadian enterprise.

### **PART THREE: REPRESENTATION & JUDICIAL APPOINTMENTS**

Should identity be a factor considered in merit-based judicial appointments, or as a justifiable exception to, or additional factor beyond merit? While the debate regarding merit is an interesting and important one, what is important to keep in mind in this discussion is the virtually unfettered nature of judicial appointments in Canada. Merit, in other words, is whatever the government decides it is.

There is no obvious connection between whether an appointment system is merit based or not and its reflection of society's diversity.<sup>27</sup> Some might argue that a more truly merit based system would remove the many barriers which marginalized, underrepresented communities now experience. Others might argue that a political commitment to diversity in appointments is more important than an allegedly objective set of merit criteria which simply would perpetuate existing barriers. Either way, I would suggest the key both to enhancing diversity and to enhancing the quality of appointments more broadly is transparency.

Transparency is critical as the appointment power afforded to the federal government is so expansive and is not subject, as a practical matter, to review or oversight. Under the *Constitution Act, 1867*, judges of s. 96 and s. 101 courts are appointed by the Governor-General in Council (i.e. the federal Cabinet), on the recommendation of the Minister of Justice (save for appointments to the Supreme Court of Canada and of Chief Justices, which are made on the recommendation of the Prime Minister). The *Constitution Act, 1867* does not speak to the content of the judicial appointments process or to the criteria for judicial selection. The *Charter of Rights and Freedoms* is also silent on the appointments process, although s. 11 of the *Charter* states that "any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an *independent and impartial tribunal*". (Emphasis added.) While independence and impartiality are guaranteed by constitutional and legal requirements, there is no legal answer to the question of the qualifications necessary for judicial office.

<sup>26</sup> L. Barnes, "Public Appointments and Representativeness" [2002] Public Law at 606 at 613.

<sup>27</sup> For a study attempting to find connections between methods of appointment and diversity, see Mark Hurwitz & Drew Noble Lanier, "Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts" (2003) 3 State Politics & Policy Quarterly 329. The study failed to identify a correlation between a particular appointment model and diversity.



The legislative framework for Supreme Court appointments, as set out in the *Supreme Court Act*,<sup>28</sup> is straightforward. Section 5 indicates that, "Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province." The most remarkable and distinctive feature of the appointment criteria is the provision in the Act requiring "at least" three judges of the Supreme Court be from Quebec.

Some have raised the question about what other forms of representation ought to be similarly entrenched. A recent panel report on Supreme Court appointments, commissioned by the Canadian Association of Law Teachers (CALT), recommended that the proportion of women on the Supreme Court not be permitted to drop below the current level of four, and further recommended a requirement that at least one member of the Supreme Court be of aboriginal heritage (either as a constitutional or statutory amendment).<sup>29</sup>

While the future of judicial appointments has engaged a growing community of academics and activists, we still know very little about the present. A rare window into the appointment process at the Supreme Court was offered by Minister of Justice Irwin Cotler, in 2004, when he appeared before a standing Parliamentary Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to explain the government's existing approach to Supreme Court appointments. He described the appointment process as it existed then as "not so much secretive as unknown".<sup>30</sup> He noted that no government had appeared before a parliamentary body to explain the process, and proceeded to do so, highlighting that the selection of a Supreme Court justice is the product of extensive consultations in the province or region where a vacancy has emerged (including discussions with the Chief Justice of Canada, the Chief Justices of the courts of the relevant region, the Attorneys General of the relevant region, at least one senior member of the Canadian Bar Association, and at least one senior member of the law society of the relevant region). He indicated that the assessment of potential nominees involved three categories of merit: professional capacity, personal characteristics and diversity. He described professional capacity in the following terms:

Highest level of proficiency in the law, superior intellectual ability and analytical and written skills, proven ability to listen and to maintain an open mind while hearing all sides of the argument, decisiveness and soundness of judgment, capacity to manage and share consistently heavy workload in a collaborative context, capacity to manage stress and the pressures of the isolation of the judicial role, strong cooperative interpersonal skills, awareness of social context, bilingual capacity and specific expertise required for the Supreme Court.

With respect to diversity, he stated simply, "Ce titre porte sur la mesure dans laquelle la composition de la cour reflète convenablement la diversité de la société canadienne."<sup>31</sup>

The lack of specificity with respect to diversity is as revealing as its inclusion as a selection criterion. Whereas professional capacity may be assessed by a range of objective factors, diversity is in the eye of the beholder.

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<sup>28</sup> R.S.C. 1985, c.S-26.

<sup>29</sup> See "Canadian Association of Law Teachers Panel on Supreme Court Appointments", online: Canadian Association of Law Teachers <[http://www.acpd-calt.org/english/docs/SupremeCourt\\_panel.pdf](http://www.acpd-calt.org/english/docs/SupremeCourt_panel.pdf)>.

<sup>30</sup> See Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, "Evidence Number 7", online: Bora Laskin Law Library, University of Toronto Faculty of Law <<http://www.law-lib.utoronto.ca/Conferences/judiciary/readings/evidence7.doc>> [Cotler].

<sup>31</sup> *Ibid.*

The evolution of Supreme Court appointments in Canada has culminated in a process with both an Advisory Committee for vetting names prior to the government's decision and a hearing process before a Parliamentary Committee after the selection of a candidate for appointment.<sup>32</sup> Importantly, however, the government is not bound by the outcome of either process, and in the case of Thomas Cromwell's appointment in December of 2008, this process was not followed, and the appointment was simply announced by the federal government in the midst of its constitutional crisis after the Governor General prorogued Parliament.

In my view, the desire for a judiciary generally, and a Supreme Court in particular, which reflects Canadian society can only be satisfied by greater transparency by government in articulating the reasons for its appointments. If diversity is as significant an aspect of Supreme Court appointments as professional capacity and personal characteristics, then it is reasonable to expect government to account for the way or ways in which a candidate resonates with the diversity of Canadians just as government ought to be able to account for why the professional capacity and personal characteristics of a candidate led to the candidate's selection.

In May of 2009, President Obama announced the nomination of Judge Sonia Sotomayor. In his remarks, he referred to Judge Sotomayor's professional capacity (for example, her experience as a prosecutor, corporate litigator and trial judge) and her personal characteristics (being principled, practical, etc), but also spoke of her "inspiring example," and her "extraordinary journey," from a childhood spent in a housing project in the Bronx to scholarships at Princeton and Yale. Obama focused on the importance of her experience as a member of a disadvantaged minority community and her perseverance in surmounting barriers – this led, in his view, to her understanding of how "ordinary people live."<sup>33</sup>

While every Supreme Court justice's path is unique, understanding what in that judge's path is of value to the government is a necessary point of departure. Though necessary, justification and transparency by themselves are not sufficient. The goal of a representative Supreme Court is not only an aspiration which the government needs to advance. It also needs to be the subject of public engagement, legal discourse and political accountability.

## CONCLUSIONS

Whatever the merits of a representative Supreme Court, it is clear that the composition of the Court reflects the commitments and challenges of a range of institutions beyond the Supreme Court, from universities and law schools, to law firms and organizations, to public servants, ministers and Parliamentarians. The pool of possible Supreme Court appointments, in other words, already reflects a filtering which leads to the structural underrepresentation of a host of communities for a host of reasons. By the same token, as those organizations make diversity an aspiration, there will be a "trickle-up" impact on Supreme Court appointments.

<sup>32</sup> Justice Rothstein was appointed following an aborted advisory committee vetting process (cut short by the Liberal's election loss in 2006) and after a brief hearing before an ad hoc committee of MPs (which had concluded before its allotted time had expired, as the members of the Committee agreed they had heard enough to reach a conclusion). The conclusion was an enthusiastic endorsement of Justice Rothstein, and he was sworn in as a justice of the Supreme Court of Canada on 6 March 2006. See Peter Hogg "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada" (2006) 44 Osgoode Hall L.J. 527-538.

<sup>33</sup> See President Obama's remarks at [http://www.huffingtonpost.com/2009/05/26/sotomayor-video-obama-int\\_n\\_207548.html](http://www.huffingtonpost.com/2009/05/26/sotomayor-video-obama-int_n_207548.html).

In addition, Supreme Court appointments have the power to create change throughout the legal community and beyond. For example, the appointment of Bertha Wilson as the first woman to the Supreme Court did not, overnight, remove gender barriers in the legal community, but her presence on the Court nonetheless had a transformative impact which made the appointment of other talented women both more likely, and indeed, expected.

Similarly, our understanding of judicial impartiality needs to be enhanced by the rationales for a representative Court. The most compelling rationales, in my view, focus on the fact that a progressive and multicultural society, committed to surmounting the barriers that marginalize the less powerful, should look to public institutions to be a reflection of society. This reflective aspiration includes more than the categories of identity that can easily be "counted." Impartiality signifies an open mind, not a blank slate. One of the least helpful metaphors in the administration of justice is the notion that justice wears a blindfold. This image is meant to convey that the poor and the rich, the powerful and the powerless, all find equal justice in our courts and equal benefit of the law, and most of all in our Supreme Court. Justice, however, is not blind. It is informed by the humanity of the judges who stand at the fulcrum of the justice system. That humanity, of course, does not arise in a vacuum.

Ultimately, the argument for a representative Court, in my view, is an argument to ensure we do not lose sight of that humanity. It need not and should not lead to one-dimensional assumptions about how white males or women of colour see the world. It should, rather, lead to enhanced public understanding and public engagement with the justice system. This public discussion needs to be informed by clear and transparent accounts of how a Supreme Court justice's identity, life experiences and perspectives are valued. This clarity and transparency begins with the government's selection process. When it comes to Supreme Court appointments, the criteria should be clear, the process should be transparent and the outcome be explained by the government in as authentic terms as possible. That same commitment to transparency ought to continue through to the judicial decision-making process. Whether explaining determinations of credibility, or elaborating on concepts such as "reasonableness" and "fairness," all judges and most of all Supreme Court justices ought to explore the extent to which their decisions are shaped by culture, ethnicity, religion, race, gender and life experiences. In this sense, *R.D.S.* represents an important early chapter in an unfinished manuscript.

The goal of this process is not to cast doubt on the legitimacy of the judicial process, but rather to situate that process within project of Canadian society. The Canadian project has its roots in accommodation, tolerance, mutual recognition, protection for minority rights, and democratic accountability. Given the centrality of the Supreme Court in articulating and advancing this project, it is worth understanding the Court as one of its primary works in progress.



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# Appointment of Justice Marshall Rothstein to the Supreme Court of Canada

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## Appointment of Justice Marshall Rothstein to the Supreme Court of Canada

### **Abstract**

Peter Hogg, a constitutional law scholar, was retained by the Commissioner for Federal Judicial Affairs to provide advice to the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada as to its procedures. His account of the public hearing provides an insider's viewpoint of the historic process undertaken for the appointment of Justice Rothstein. His opening remarks to the committee, appended to this commentary, set out the parameters of questioning for the hearing, but raise additional questions with regard to the appropriate limits of judicial speech.

### **Keywords**

Canada. Supreme Court; Judges--Selection and appointment; Canada

## *Commentary*

# APPOINTMENT OF JUSTICE MARSHALL ROTHSTEIN TO THE SUPREME COURT OF CANADA<sup>©</sup>

PETER W. HOGG\*

Peter Hogg, a constitutional law scholar, was retained by the Commissioner for Federal Judicial Affairs to provide advice to the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada as to its procedures. His account of the public hearing provides an insider's viewpoint of the historic process undertaken for the appointment of Justice Rothstein. His opening remarks to the committee, appended to this commentary, set out the parameters of questioning for the hearing, but raise additional questions with regard to the appropriate limits of judicial speech.

Peter Hogg, spécialiste en droit constitutionnel, a été choisi par le commissaire de la Magistrature fédérale pour conseiller la Commission ad hoc au sujet de ses procédures. Son compte rendu de l'audience publique expose le point de vue d'un initié sur l'évolution au cours des temps de la procédure appliquée pour la nomination du juge Rothstein. Les remarques d'introduction au comité, annexées aux présentes observations, décrivent les paramètres des questions posées durant l'audience, mais soulèvent des questions supplémentaires concernant les limites appropriées des exposés juridiques.

## I. INTRODUCTION

The process for the appointment of Justice Marshall Rothstein to the Supreme Court of Canada in 2006 included the innovation of a public hearing by an "Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada." This committee of parliamentarians interviewed the nominee before his appointment. At the invitation of the committee, I addressed the committee on the limits of judicial

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speech. What follows is a description of the background to the appointment of Justice Rothstein, and a suggestion as to how the process might be adjusted for future appointments. My remarks to the committee are appended to this commentary.

## II. THE POWER AND PROCESS OF APPOINTMENT

The appointment of judges to the Supreme Court of Canada is provided for in the *Supreme Court Act*.<sup>1</sup> The convention that has developed for judicial appointments generally is that chief justice appointments are made on the recommendation of the prime minister and puisne judge appointments are made on the recommendation of the minister of justice. In the case of the Supreme Court of Canada, however, it seems likely that the prime minister is involved in the appointments of the puisne judges as well as the chief justice. In the case of the appointment of Justice Rothstein, Prime Minister Harper made it clear that, after the public hearing, he was going to make the final decision, and he did in fact make the final decision.

Until 2004, no part of the appointment process was public. It was understood that the minister of justice would consult with the Chief Justice of Canada, with the attorneys general and chief justices of the provinces from which the appointment was to be made, and with leading members of the legal profession, but this was all informal and confidential.

In 2004, the Honourable Irwin Cotler, who was minister of justice in the Liberal government of Paul Martin, introduced a more transparent process to find replacements for retiring Justices Louise Arbour and Frank Iacobucci. He presented the names of his nominees for the replacements (Justices Louise Charron and Rosalie Abella) to the Standing Committee on Justice of the House of Commons, and he answered questions posed to him by the committee about the search process and the qualifications of the nominees. After that appearance, the two nominees were appointed. The nominees themselves did not appear before the committee.

When the retirement of Justice John Major was announced in 2005, Minister Cotler announced a new and more elaborate process that

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<sup>1</sup> R.S.C. 1985, c. S-26, s. 4 provides that appointments are to be made by "the Governor in Council."

2006]

*Appointment of Justice Rothstein*

529

would be used to fill the vacancy. After the usual informal consultations with the attorneys general, chief justices, and leading members of the legal profession, the minister would submit a short list of five to eight candidates to an advisory committee composed of a member of parliament (or senator) from each recognized party in the House of Commons, a nominee of the provincial attorneys general, a nominee of the provincial law societies, and two prominent Canadians who were neither lawyers nor judges. The committee would provide the minister with a short list of three names from which the appointment would be made. All of this would take place on a confidential basis. However, the final step would be public: the minister of justice (but not the appointee) would appear before the Standing Committee on Justice to explain the selection process and the qualifications of the person selected.

This process was duly commenced to fill the vacancy left by Justice Major. An appointed advisory committee provided the minister with a short list of three names. However, on 29 November 2005, before the final selection was made, the government was defeated in the House of Commons and Parliament was dissolved for the election that took place on 23 January 2006. One of the policies of the newly elected Conservative government was a public, parliamentary interview process for proposed appointees to the Supreme Court of Canada.

The new Conservative minister of justice, the Honourable Vic Toews, decided to work from the short list provided by the advisory committee appointed by the previous government. The prime minister, no doubt in consultation with the minister of justice, chose one candidate from that list. That candidate then had to submit to the new public interview process. With the agreement of all the party leaders, the government established the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada. The committee consisted of twelve MPs drawn from each party in proportion to their standings in the House of Commons. The minister of justice, who was one of the Conservative members, was the chair of the committee. His predecessor, Irwin Cotler, was one of the Liberal members.

The committee held a televised hearing on Monday, 27 February 2006. The name of the nominee, Justice Marshall Rothstein of the Federal Court of Appeal, had been made public the previous



Wednesday,<sup>2</sup> and members of the committee had been supplied with a dossier which included his curriculum vitae, a list of all of his decisions, four sample opinions in full, a list of his publications, and four sample publications in full. The hearing took place from 1:00 p.m. to 4:30 p.m. It opened with a short introduction of the nominee and the process by the chair (the minister), then continued with opening remarks by me, then with opening remarks by Justice Rothstein, then with questions from the members of the committee, then with a closing statement by me and a closing statement by the chair. During the question period, Justice Rothstein was asked approximately sixty questions in two rounds of questioning.<sup>3</sup>

The committee did not prepare a written report. The prime minister watched the proceedings on television, and no doubt the minister of justice reported to him. As well, at the conclusion of the hearing, the minister invited the members of the committee to communicate their views directly to the prime minister. The result was a foregone conclusion in that the nominee's credentials, his statement to the committee, and his answers to questions left no doubt as to his suitability for appointment, and the reaction of the committee members left no doubt that they would advise the prime minister to proceed with the appointment.

Two days after the hearing, the prime minister announced in a written statement that he had selected the nominee and would recommend him for appointment by the governor in council. Justice Rothstein was duly appointed, and was sworn in as a justice of the Supreme Court of Canada on 6 March 2006.

### III. CONDUCTING THE PUBLIC HEARING

I was retained by the Commissioner for Federal Judicial Affairs, whose office administers the processes of federal judicial appointments, to provide advice to the ad hoc committee as to its procedures. My initial thought was that I would prepare a protocol that would limit the kinds of questions that committee members could ask the nominee, and

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<sup>2</sup> There was an unfortunate leak, duly reported in the media, of the names of the other short-listed, but unsuccessful, candidates. I discuss this later in this commentary.

<sup>3</sup> Three questions were asked per member on the first round, and two per member on the second round. The Committee elected not to continue for a third round.

that the protocol would be enforced by the committee chair. However, what emerged from deliberations within the government was the view that a binding protocol was not the way to go, and that the MPs on the committee should be free to ask any questions they wanted. This view was adopted by the committee, which decided that the chair would not attempt to impose limits on the questions that could be asked. My role became one of giving guidance to the committee as to the kinds of questions that could or could not be answered by the nominee. At the hearing, I made an opening statement to the committee explaining what its role was and what the appropriate limits of judicial speech were. I then remained with the nominee at the hearing in case any questions arose with which I could assist.<sup>4</sup>

In retrospect, it was the right decision not to impose any limit on questioning by members of the committee. A protocol enforced by the chair would have given the impression of a tightly controlled hearing; this would have annoyed the MPs to say nothing of the audience; and I think the committee would not have obtained as full a picture of the nominee. As it was, the questions at the hearing were always civil and respectful, and Justice Rothstein's courtesy and good humour kept it all very pleasant. He was adept at handling the questions. Although the committee members understood the limits of judicial speech, they could not resist asking some questions on top-of-mind policy issues such as crime in the cities, gun control, and the elimination of poverty. Each time, Justice Rothstein acknowledged the validity of the concern and responded by saying something such as "that's your issue, not mine," reminding everyone of the boundaries of questioning. I observed that, without exception, the questioners seemed perfectly happy with this response.

#### IV. . . FUTURE HEARINGS

For the future, it would be politically difficult for a federal government to revert to a wholly confidential process, and I think it would be a mistake to do so. Certainly, the hearing established that Canadian parliamentarians can conduct a civil hearing that poses no danger of politicizing the judiciary or of embarrassing the nominee. It is

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<sup>4</sup> In fact, I was asked two questions by members of the committee: one on practices in other Commonwealth countries, the other on the wisdom of a special constitutional court.

true that in 2006 the stars were particularly well aligned for a peaceful hearing since the nominee had been drawn by a Conservative government from a short list prepared by a committee set up by a Liberal government and on which all parties were represented. Senate confirmation hearings in the United States are typically focused on issues like abortion, and inevitably take on a partisan and rancorous atmosphere.<sup>5</sup> But the political parties in Canada, unlike the Republican and Democratic parties in the United States, have not defined themselves primarily by reference to issues that have been decided by the highest court, such as abortion. Nor have Canadian prime ministers, unlike American presidents, ever made any effort to pack the highest court with their supporters.<sup>6</sup> Canadian hearings are never likely to become like the American confirmation hearings.

Canadian hearings are advisory only, since neither the *Supreme Court Act* nor the constitution provides any formal role for Parliament. This lowers the temperature in Canada, because in the end the government will be able to insist on the appointment of its nominee. In the United States, by contrast, the constitution requires the appointment of a Supreme Court justice to be made by the president, with the advice and consent of the Senate.<sup>7</sup> The Senate can block the appointment, and senators who do not belong to the president's party have a political incentive to strive mightily to do so. Moreover, in the United States, unlike Canada, there does not seem to be an institutionalized process of consultation to ensure that appointments are always of high quality, so that in some cases there really is legitimate concern about the quality of a presidential nominee. When this occurs,

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<sup>5</sup> Even so, one observes that strongly qualified nominees are prepared to come forward, and they handle the difficult proceedings with aplomb.

<sup>6</sup> The original court-packing plan was devised by a Democrat, President Franklin D. Roosevelt, to overcome the destruction of his New Deal at the hands of an ultra-conservative Supreme Court, which believed that measures such as minimum wages or limitations on hours of work, let alone the New Deal programs to combat the depression of the 1930s, were contrary to the Bill of Rights. After the swing judge on the nine-man Court changed his mind in 1937, the so-called *Lochner* era ended without the implementation of the expansion of the Court that had been proposed by the President. A period of judicial restraint ensued, but decisions in the 1960s and 1970s on issues such as abortion, contraception, pornography, desecration of the flag, and rights of criminal defendants raised the ire of conservatives, prompting a new round of hostility to the Court and open demands for the appointment of more conservative judges.

<sup>7</sup> U.S. Const. art. II, § 2(2).

senatorial opposition becomes more bipartisan, and this can lead to the defeat or (more usually) the withdrawal of the nomination.

The prospect of a public hearing operates as a deterrent to a government that is considering making a partisan appointment of a poorly qualified person. This does not seem to be necessary in Canada, where the diligence of the Government of Canada's routine informal process of consultation, which has yielded consistently strong appointments in the past, will undoubtedly continue to yield strong nominations. Presumably, Canadian federal governments will continue to believe that it is good politics to make good appointments. Presumably, as well, governments will not care so intensely about the decisions of the Court that they will want to influence future decisions through the appointment process. I have already made the point that the "wedge issues" in Canadian political debate tend not to be decisions of the Supreme Court of Canada. As well, we have a weaker form of judicial review in Canada under the *Charter of Rights and Freedoms* than the strong form of judicial review in the United States. Judicial decisions striking down laws on *Charter* grounds usually leave room for a legislative response and usually get a legislative response that accomplishes the objective of the law that was struck down.<sup>8</sup> Court packing and court bashing are not as necessary in Canada as American politicians perceive them to be in America.

If the impulse to hold public hearings to interview Supreme Court nominees does not stem from any concerns about the quality of the people nominated or the suspicion of court-packing motives on the part of government, what is the basis for it? I think it is really the democratic notion that important decisions should be transparent. Based on comments in the press and many comments made to me personally after the hearing, lay people as well as lawyers were eager to receive some real information about the work that Supreme Court judges do. People were curious about the way in which cases come to the Court, the materials that have to be studied for each case, the

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<sup>8</sup> The Canadian *Charter of Rights and Freedoms* explicitly permits legislatures to enact limits on *Charter* rights (s. 1) and even to use a notwithstanding clause to override *Charter* rights (s. 33). The common phenomenon of *Charter* decisions being followed by legislative sequels is the subject of considerable literature focusing on the idea of "dialogue" between courts and legislatures. For a recent contribution, see P.W. Hogg, A.A. Bushell Thornton & W.K. Wright, "Charter Dialogue Revisited—Or Much Ado About Metaphors" (2007) 45 Osgoode Hall L.J. [forthcoming].

hearing at which all parties' arguments are heard and tested, and the way in which judges try to reach decisions that are faithful to the law and the facts. The public interview of Justice Rothstein was surely a useful antidote to the vague charges of judicial activism that float around after unpopular decisions. It was also interesting to see a judge answer questions about his career and his work, which sent a reassuring message about the industry, ability, and integrity of the person who was about to join the Court.<sup>9</sup>

People are interested in appointments to the Court. This is demonstrated by the experience of the existing judges, each of whom on appointment was bombarded with questions and requests for interviews by the media. There is much to be said for dealing with this media interest in the form of a structured public hearing before appointment. The hearing, which is broadcast on television and reported on by the print media, is inevitably more thorough and informative than the story that any one journalist can realistically expect to obtain alone.

In summary, I am in favour of a public hearing by a parliamentary committee as part of the process of appointing judges to the Supreme Court of Canada. I think that public hearings will significantly benefit Canadians by helping them to understand the appointment process and the judicial function and to learn about the qualifications of the person nominated for appointment. The retention of counsel, the development of guidelines as to what can and cannot be answered by the nominee, and the willingness of committee members to respect the guidelines are features of the 2006 process that should be repeated. With these features in place, judicial independence will not be threatened by public hearings.

## V. SCREENING BY AN ADVISORY COMMITTEE

I would make one suggestion for future appointments, and that is to eliminate the screening of potential appointees to the Supreme

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<sup>9</sup> It is possible to exaggerate the transparency of a process that culminates in a public hearing. The candidate does not know, and the hearing will not disclose, what considerations moved the government to choose the candidate over other well-qualified persons. However, each appointment will have unique elements, and considerations of practicality and confidentiality probably make it unrealistic for public information to go beyond information about the role of judges on the Court, the search process, and the qualifications of the particular candidate. And these, I suggest, are the truly important matters.

Court of Canada by an advisory committee. In my view, there are two objections to the advisory committee process. The first is that it compromises what I regard as the desirable principle of executive appointment. For a single, occasional, high-profile appointment, I do not think the government should be restricted to a short list developed by an advisory committee. (Considerations are different for appointments to courts that have to be made frequently, and are not going to attract much public notice.) My concern is that the dynamics of deliberation in a diverse committee may eliminate candidates against whom some objection can be made. The tendency, I would fear, is that only the safest and least controversial persons would achieve consensus in the committee. Such persons are often excellent judges, but may not always be the best person for the Court at that particular time. Consider the precedent of Bora Laskin, who was appointed to the Court in 1970 and elevated to chief justice in 1973. His appointment was controversial because he was the first Jew to be appointed and the first full-time academic to be appointed. He would probably have been regarded as an "unsound" candidate by an advisory committee in 1970. And yet, as Prime Minister Trudeau anticipated at the time, and as is now generally recognized, he made a more important contribution to the Court than a person with more conventional credentials might have done. The 1982 appointment of Bertha Wilson, who was the first woman appointed to the Court, provides another example. My point is that the minister of justice and prime minister are better able, after informal consultations, to assess the nature and force of opposition to a candidate and how that candidate would contribute to the Court, than would a diverse committee which is seeking consensus.<sup>10</sup>

A less important objection to the advisory committee screening process is that too many people are engaged in the selection process, leading to the risk of leaks that could be embarrassing to the persons under consideration. This time, the three names that the advisory committee submitted to the minister of justice were apparently<sup>11</sup> leaked to the media. When the name of the nominee was officially announced, it was obvious who had been rejected. To be sure, it is no disgrace to fail

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<sup>10</sup> If it were determined to keep the advisory committee at the beginning of the process, its list should not be binding on government, so that an unusual appointment would not be precluded.

<sup>11</sup> Neither the minister of justice nor anyone else who was privy to the deliberations of the committee ever publicly acknowledged that the leaked names were in fact the ones on the short list.

to receive a Supreme Court appointment, but it is preferable for the names of the unsuccessful candidates to be kept secret. That is hard to do if the names and their files have been moved outside the professional civil service and distributed to an advisory committee that may include members who are not accustomed to the constraints of confidentiality in the face of intense media interest.

If there is some force in these two objections to the advisory committee process, then it makes little sense to retain the process when the final nominee is going to be subjected to a public interview process by a parliamentary committee. Surely, that by itself is a sufficient guarantee against a poorly qualified or partisan appointment. It seems to me that executive selection of the candidate (after the normal informal consultations), followed by a parliamentary interview, followed by a final executive decision, is the ideal process for those occasional appointments that have to be made to the Supreme Court of Canada.<sup>12</sup>

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<sup>12</sup> For other courts, where a steady stream of appointments has to be made, and where there is little media scrutiny of the appointments, different considerations apply.

2006]

*Appointment of Justice Rothstein*

537

APPENDIX

JUDICIAL INTERVIEW PROCESS

Notes for opening remarks to  
Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada  
By Peter W. Hogg  
Reading Room, Centre Block, Parliament Buildings  
February 27, 2006

INTRODUCTION

This is an historic moment. It is the first time that a Government nominee for appointment to the Supreme Court of Canada has been interviewed in public by a committee composed of Members of Parliament. The purpose of this new process is to make appointments to the Court more open, and to promote public knowledge of the judges of the Court.

The process is not without controversy. Everyone would agree in principle that important public decisions be open and public. But there are those—many of them in the legal profession—who fear that a parliamentary review of judicial appointments carries more risk than benefit. The critics argue that an open process will tend to politicize the judiciary, and publicly embarrass the distinguished people who are nominated for appointment. This Committee, today, has the opportunity to show the critics that they are wrong. This Committee has the opportunity to demonstrate that the Canadian virtues of civility and moderation can make an open and public process work.

ROLE OF COMMITTEE

The authority to make appointments to the Supreme Court of Canada is possessed by the Governor in Council. That is prescribed in the *Supreme Court Act*, and that has not been changed. So this appointment will have to be made by the Governor in Council, which will act on the advice of the Prime Minister. This Committee is charged with providing advice to the Prime Minister. He has undertaken to take into account the deliberations and views of the Committee in deciding whether or not to proceed with the appointment of Mr. Justice Rothstein.

This Committee has the task of interviewing Mr. Justice Rothstein to determine whether he is well qualified to serve on the Court. It really is a job interview, and like any other job interview the questions to the candidate should respect both his dignity and his privacy. As well, any questions put to the candidate should proceed from an understanding of the role that is played by a judge of the Supreme Court of Canada. I want to say something about that role.

ROLE OF JUDGES

Judges decide cases by finding the facts that are relevant and applying the law to those facts. In the appeals that reach the Supreme Court of Canada, there is the further complication that the law itself is usually unclear. That is usually why the case has gone all the way to the highest court. In that case, the judges have to decide what the law is, as well as how it applies to the facts of the case.

Before each appeal is heard the judges are required to read and digest a massive amount of material. They read the decisions of the lower courts that are being appealed, they read at least some of the transcript of the evidence at trial, they read the decided cases that are arguably precedents for the case, they read the articles by law professors that bear on the issue, and they read the factums—the briefs of argument—that are filed by counsel on both sides of the case. And then, when the appeal is heard, the judges listen to the oral arguments of counsel on both sides, and they test those arguments by asking questions. Only after carefully considering all of this material, and weighing the arguments on both sides, are the judges able to reach a decision.



The Supreme Court of Canada decides about a hundred appeals every year. Each one of them involves the reading and research that I have just described. And of course the Court has to reach a decision on each appeal, and then write an opinion. The Court of nine judges is usually unanimous, but in a minority of cases the Court is divided and one or more dissenting opinions have to be written. So it is a heavy workload that we require of our Supreme Court judges.

#### LIMITS ON QUESTIONS

When you think about the role that Mr. Justice Rothstein will be called upon to play if his nomination is confirmed, it becomes obvious that there are some questions that he cannot be expected to answer.

He cannot express views on cases or issues that could come before the Court. He cannot tell you how he would decide a hypothetical case. He might eventually be faced with that case. For the same reason, he cannot tell you what his views are on controversial issues, such as abortion, same-sex marriage or secession. Those issues could come to the Court for decision in some factual context or other. Any public statements about the issues might give the false impression that he had a settled view on how to decide those cases—without knowing what the facts were, without reviewing all the legal materials, and without listening to and weighing the arguments on both sides.

Another kind of question that is inappropriate for a judge to answer is the question of why he decided a particular case in a particular way. Because Justice Rothstein is a sitting judge, he has written many opinions. These are listed in the dossier that members of the Committee have been given. Several of the opinions have been included in full as samples. His reasons for decision in each of those cases are set out in writing. While he can talk in general terms about his work as a judge, and even about the issues in particular cases, he cannot give an oral explanation of why he decided a particular case. He has done that in his written opinion. That opinion is a precedent that lawyers and other judges will rely upon. They should be able to rely on the written opinion, and not have to hunt down oral explanations by the judges as well. Written opinions are available to all. Oral explanations are limited to those who hear them.

#### QUALITIES OF THE NOMINEE

What the members of the Committee can and should do is to satisfy yourselves that this person has the right stuff to be a judge of the Supreme Court of Canada. Does he have the professional and personal qualities that will enable him to serve with distinction as a judge on our highest court? Let me suggest six qualities that you might want to explore in your questioning.

1. He must be able to resolve difficult legal issues, not just by virtue of technical legal skills, but also with wisdom, fairness, and compassion;
2. He must have the energy and discipline to diligently study the materials that are filed in every appeal;
3. He must be able to maintain an open mind on every appeal until he has read all the pertinent material and heard from counsel on both sides;
4. He must always treat the counsel and the litigants who appear before him with patience and courtesy;
5. He must be able to write opinions that are well written and well reasoned; and
6. He must be able to work cooperatively with his eight colleagues to help produce agreement on unanimous or majority decisions, and to do his share of the writing.

Ladies and gentlemen of the Committee: If today you find the person with those qualities, the nation will thank you, and the Prime Minister will have an easy choice ahead of him. That concludes my remarks.

## **Reforming the Supreme Court Appointment Process, 2004-2014: A 10-Year Democratic Audit\***

**Adam M. Dodek\*\***

The way in which Justice Rothstein was appointed marks an historic change in how we appoint judges in this country. It brought unprecedented openness and accountability to the process. The hearings allowed Canadians to get to know Justice Rothstein through their members of Parliament in a way that was not previously possible.<sup>1</sup>

— The Rt. Hon. Stephen Harper, PC

[J]udicial appointments ... [are] a critical part of the administration of justice in Canada ... This is a legacy issue, and it will live on long after those who have the temporary stewardship of this position are no longer there. If the act of appointing judges is a priority, the process of appointing them is no less so. Indeed, the integrity and

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\* This paper is dedicated to Professor Emeritus Jacob Ziegel of the University of Toronto's Faculty of Law. I know of no one who cares more passionately about the importance of the Supreme Court of Canada appointment process. In appreciation.

\*\* Faculty of Law, University of Ottawa. Exceptional research assistance was provided by Emily Alderson, J.D. 2015 (expected). Thanks to Stephen Bindman, Ian Greene, Carissima Mathen, Peter Russell, Nadia Verrelli and two anonymous reviewers for reading earlier drafts and providing helpful comments. This paper was presented as part of the Osgoode Constitutional Cases Conference in April 2014. Appreciation to my co-panellists Hugo Cyr, Rosemary Cairns Way and Bruce Ryder, and to David Schneiderman and Dahlia Lithwick for helpful questions. Earlier versions of this paper were presented at forums sponsored by the University of Ottawa's Public Law Group on Appointments to the Supreme Court of Canada in October 2011 and on the Supreme Court of Canada in February 2013. Research for this study was funded by the Social Science and Humanities Research Council.

<sup>1</sup> News Release, "Prime Minister announces appointment of Mr. Justice Marshall Rothstein to the Supreme Court" (March 1, 2006), online: <<http://pm.gc.ca/eng/news/2006/03/01/prime-minister-announces-appointment-mr-justice-marshall-rothstein-supreme-court>>.

fairness of the process is not unrelated to the excellence and independence of the judiciary.<sup>2</sup>

— The Hon. Irwin Cotler, PC, OC, QC (Minister of Justice and Attorney General of Canada, 2003–2006)

## I. INTRODUCTION

As Irwin Cotler stated above, judicial appointments matter. They matter because Supreme Court of Canada judges exercise important functions not only in the administration of justice but also in Canadian democracy: the Supreme Court is a critical institution in our society. As Prime Minister Harper declared, the process by which our high court judges are appointed also matters. It matters for the Supreme Court but also for the other branches of government: the executive and the legislative (*i.e.*, Parliament). The recent appointment of Justice Nadon raises serious questions about that appointment process that deserve attention.

On October 22, 2013, the Governor-in-Council directed a reference to the Supreme Court of Canada regarding the eligibility of Justice Marc Nadon to be appointed to that Court<sup>3</sup> and introduced legislation in an omnibus budget bill to clarify that federal court judges were qualified for

<sup>2</sup> Irwin Cotler, "The Supreme Court Appointment Process: Chronology, Context and Reform" (2007) 58 U.N.B.L.J. 131, at 131 [hereinafter "Cotler, 'The Supreme Court Appointment Process'"]. To the same effect, see Shimon Shetreet & Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary*, 2d ed. (Cambridge: Cambridge University Press, 2013) 102: "In any system, the methods of appointment have direct bearing on both the integrity and independence of the judges. Weak appointments lower the status of the judiciary in the eyes of the public and create a climate in which the necessary independence of the judiciary is liable to be undermined. Similarly, political appointments that are seen by the public as not based on merit may arouse concern about the judge's independence and impartiality on the bench."

<sup>3</sup> Order in Council P.C. 2013-1105. This reference asked the Supreme Court to answer two questions: (1) "Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?" and (2) "Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No.2*?" The Supreme Court heard the reference on an abridged timetable on January 15, 2014 and issued its decision (technically an "advisory opinion") on March 21, 2014. See *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21 (S.C.C.) [hereinafter "*Supreme Court Reference*"]. See generally Justice Canada, Press Release, "Government of Canada Takes Steps to Clarify Certain Eligibility Criteria for Supreme Court Justices", October 22, 2013, online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc\\_32973.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32973.html)>.

appointment under the *Supreme Court Act* for the three seats designated for Quebec.<sup>4</sup> Less than a month before, on September 30, 2013, the Prime Minister had announced Justice Nadon as his “nominee” to replace Justice Morris Fish as one of the three Quebec judges on the Supreme Court.<sup>5</sup> Two days later, on October 2, 2013, Justice Nadon appeared before a committee of Members of Parliament (“MPs”) for what has become known colloquially as “a parliamentary hearing”.<sup>6</sup> The next day the Prime Minister confirmed his selection of Justice Nadon.<sup>7</sup> On October 7, 2013, Justice Nadon was officially sworn in as a member of the Supreme Court of Canada.<sup>8</sup> Later that day, Toronto lawyer Rocco Galati launched a challenge to Justice Nadon’s appointment in the Federal Court of Canada.<sup>9</sup> On October 8, 2013, the Supreme Court announced that Justice Nadon would not participate in matters before the Supreme Court in light of the challenge to his appointment.<sup>10</sup> Justice Nadon and the Supreme Court were placed in limbo for the next five months until the Court’s decision on March 21, 2014, which declared his appointment to be *void ab initio* and the government’s legislative amendments *ultra vires*.<sup>11</sup>

<sup>4</sup> See Bill C-4, *A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures (Economic Action Plan 2013 Act, No. 2)*, S.C. 2013, c. 40, ss. 471 and 472. *Supreme Court Act*, R.S.C. 1985, c. S-26.

<sup>5</sup> Press Release, “PM Announces Nominee for the Supreme Court of Canada”, September 30, 2013, online: <<http://pm.gc.ca/eng/news/2013/09/30/pm-announces-nominee-supreme-court-canada>>.

<sup>6</sup> The Committee is not, strictly speaking, a “parliamentary committee”. Rather, it is a “committee of parliamentarians”. As discussed *infra* in Part II, this is a distinction with a difference. The committee is composed of MPs but it is created not by Parliament, but by the executive, and therefore it is not subject to the rules of Parliament, including parliamentary privilege. This distinction is discussed in note 235 regarding MP Joe Comartin’s comments regarding Rothstein J. at the October 2011 hearings for Justices Moldaver and Karakatsanis.

<sup>7</sup> See Order in Council P.C. 2013-1050, referenced in *Supreme Court Reference*, *supra*, note 3, at para. 9.

<sup>8</sup> Supreme Court of Canada, News Release, October 7, 2013, online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/4399/index.do>>.

<sup>9</sup> *Supreme Court Reference*, *supra*, note 3, at para. 9; *Galati et al. v. The Right Honourable Stephen Harper et al.*, Federal Court of Canada, File No. T-1657-13. See Sean Fine, “Justice Nadon steps aside from Supreme Court until legal challenge resolved” *The Globe and Mail* (October 8, 2013), online: <<http://www.theglobeandmail.com/news/politics/supreme-court-justices-appointment-challenged-in-court/article14743436>>.

<sup>10</sup> Supreme Court of Canada, News Release, October 8, 2013, online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/4401/index.do>>; Sean Fine, “Justice Nadon steps aside while legal challenge heard” *The Globe and Mail* (October 9, 2013) A3; Tobi Cohen, “Supreme Court appointment challenged; Judicial review; Activist lawyer argues Nadon not qualified” *National Post* (October 9, 2013) A5.

<sup>11</sup> *Supreme Court Reference*, *supra*, note 3.

At the moment that Rocco Galati brought his legal challenge, it should have been apparent that the appointment process had failed, at least to the extent that it is supposed to serve a vetting function. Only seven days had elapsed between the time that the Prime Minister announced Justice Nadon as his nominee on Monday, September 30, 2013 and Justice Nadon's swearing in as a Supreme Court justice on Monday, October 7, 2013.

The appointment process failed to adequately address the issue of whether Justice Nadon was qualified for appointment to the high court under the *Supreme Court Act*.<sup>12</sup> This is obvious. However, the appointment process failed in at least three other respects. First, it constituted a failure of transparency in several ways. The controversy following Justice Nadon's appointment raised many unanswered questions about how the appointments process operated: what were the qualifications upon which candidates were selected and evaluated? How did the Minister of Justice choose the so-called "long list" of candidates to be considered? How many candidates were on this "long list"? How did the Supreme Court Selection Panel operate? What was its mandate from the Minister of Justice? How did the members decide on the recommendations for the shortlist? Consensus? Unanimity? Majority vote?<sup>13</sup>

The appointment process also failed to produce accountability. Neither the Minister of Justice nor the Prime Minister provided an adequate explanation of why they selected Justice Nadon for this important post. This was unfair both to Justice Nadon and to the Canadian people. The accountability failure is connected to the transparency failure: in the absence of identifying the criteria for selection, it becomes impossible to explain how a candidate meets those unknown criteria.<sup>14</sup>

Many questions have been raised about the Nadon appointment and the *Supreme Court Reference* will no doubt be the subject of much discussion for years to come. It is not my intention or desire to dissect those

<sup>12</sup> See *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 4-5.

<sup>13</sup> We have learned more about the operation of the appointment process for Justice Nadon through the Government's response to Order Questions submitted by Irwin Cotler, MP and Stéphane Dion in 2014. See Order Paper Question 73, House of Commons, Sessional Paper, 8555-412-74; Order Paper Question 239, House of Commons, Sessional Paper 8555-412-239.

<sup>14</sup> Cf. Carissima Mathen, "Choices and Controversy: Judicial Appointments in Canada" (2007) 58 U.N.B.L.J. 52, at 71 [hereinafter "Mathen, 'Choices and Controversy'"]: "The lack of clarity around the most important criteria for our highest judges is unacceptable and demands sustained and serious thought."

issues here.<sup>15</sup> Rather, the Nadon appointment provides a useful vantage point to gaze back and evaluate the changes to the Supreme Court appointment process over the past decade.<sup>16</sup>

Thus, this paper analyzes the Supreme Court appointment process over the 10-year period from 2004 through the end of 2013. The year 2004 has been selected because the vacancies caused by the departures of Justices Iacobucci and Arbour in that year led to the beginning of a decade of reforms to the appointment process. The changes begun by Liberal Minister of Justice Irwin Cotler in 2004 led to further reforms by the Conservative government when it took office in 2006. Between 2004 and 2013, eight Supreme Court Justices have been appointed under variants of a reformed appointment system: Rosalie Silverman Abella and Louise Charron (2004), Marshall Rothstein (2006), Thomas Cromwell (2008), Michael Moldaver and Andromache Karakatsanis (2011), Richard Wagner (2012) and Marc Nadon (2013).<sup>17</sup> In 2014, Justice LeBel is scheduled to retire and we can anticipate a similar process being used as in the past three appointments by Prime Minister Harper.

This paper conducts a *democratic audit*<sup>18</sup> of the Supreme Court appointment process<sup>19</sup> and not an evaluation of the judges appointed

<sup>15</sup> On the issues before the Court in the *Supreme Court Reference*, see Michael Plaxton & Carissima Mathen, "Purposive Interpretation, Quebec, and the *Supreme Court Act*" (2013) 22:3 Const. Forum 15 (cited in the *Supreme Court Reference*, *supra*, note 3, at para. 58); Paul Daly, "More on Section 6 of the Supreme Court Act: Legislative History and Purpose", Administrative Law Matters (October 16, 2013), online: <<http://administrativelawmatters.blogspot.ca/2013/10/more-on-section-6-of-supreme-court-act.html>>; House of Commons Standing Committee on Justice and Human Rights, 41st Parl., 2nd Sess., Tuesday November 19, 2013 (Evidence), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6307059&Language=E&Mode=1&Parl=41&Ses=2>>; and Thursday November 21, 2013, online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6317974&Language=E&Mode=1&Parl=41&Ses=2>>.

<sup>16</sup> I do not think it is too early to conduct a retrospective of the reforms despite admonitions to the contrary. As my colleague Carissima Mathen relates, Justice Rothstein was asked at his hearing whether he thought the process was a good one. He replied: "You're asking me whether I think this is a good process. The question reminds me of a story. They say that shortly after the Communist revolution in 1949 one of the Chinese leaders was asked whether he thought the French Revolution was a success. His answer was that it was too early to tell. Perhaps I have to say it's too early to tell." Parliament of Canada, *Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada* (February 27, 2006), quoted by Mathen, "Choices and Controversy", *supra*, note 14, at 53, note 9.

<sup>17</sup> The Supreme Court declared the appointment of Justice Nadon to the Supreme Court to be *void ab initio* in the *Supreme Court Reference*, *supra*, note 3. However, the appointment is still considered for purposes of evaluating the reforms to the appointment system between 2004 and 2013.

<sup>18</sup> As discussed in Part III, *infra*, I take the concept of a "democratic audit" from William Cross, "Foreword" in Ian Greene, *The Courts* (Vancouver: UBC Press, 2006) vii, at vii.

<sup>19</sup> I do not address the changes made by Minister of Justice Vic Toews in 2006 to the Judicial Advisory Committees ("JACs") that screen the pool of candidates for other federal

through this process. Evaluating Supreme Court judges for their supposed "merit" is an exercise fraught with difficulty, not the least because of its subjectivity.<sup>20</sup> It may also be more a matter of taste or judgment than objective criteria.<sup>21</sup> Moreover, as I discuss in Part III, the process has largely failed to publicly articulate the criteria upon which the judges are selected.<sup>22</sup> In the absence of an articulation of the criteria for appointment, those selected cannot be evaluated based on unknown criteria. Thus, instead of evaluating the judges, I evaluate the process used to select them through the idea of a *democratic audit*.

This paper has five parts in addition to this introduction. Part II presents a short history of the Supreme Court appointments process

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appointments. See Department of Justice Canada, Press Release, "Minister Toews pleased to announce changes to Judicial Advisory Committees" (November 10, 2006); Canadian Judicial Council, News Release, "Canadian Judicial Council calls on government to consult on proposed changes" (November 9, 2006); Canadian Judicial Council, Press Release, "Judicial Appointments: Perspective from the Canadian Judicial Council" (February 27, 2007); Canadian Bar Association, News Release, "CBA Says Recent Changes to the Judicial Appointment Process Must Be Reversed" (March 20, 2007); Canadian Association of Law Teachers, Press Release, "Canadian Association of Law Teachers Reiterate its Position Concerning Reforms to Federal Judicial Appointments and Criticizes Reforms Recently Envisaged by the Federal Minister of Justice" (November 29, 2006); Rainer Knopff, "The Politics of Reforming Judicial Appointments" (2008) 58 U.N.B.L.J. 44; F.C. DeCoste, "Howling at Harper" (2008) 58 U.N.B.L.J. 121; Peter Russell, "An Error of Judgment" *The Globe and Mail* (February 27, 2007) A21. On the pre-reformed s. 96 appointment process, see E. Neil McKelvey, "Foreword: Appointment of Section 96 Judges" (2008) 58 U.N.B.L.J. 5. See generally Canadian Bar Association, *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985).

<sup>20</sup> Cf. Allan C. Hutchinson, "Looking for the Good Judge: Merit and Ideology" [hereinafter "Hutchinson"] in Nadia Verrelli, ed., *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal & Kingston: Institute of Intergovernmental Relations, 2013) 99 [hereinafter "Verrelli"].

<sup>21</sup> Because of the nature of the work of the Supreme Court — a limited caseload, a long lag time between hearings and decisions, the collegial nature of decision-making — I do not think that one can begin to judge a Supreme Court judge until she or he has spent five years on the high court. Thus, I think *The Globe and Mail's* negative assessment of Justice Karakatsanis one year after her appointment was grossly unfair. See Editorial, "Weak process for weighty choices" *The Globe and Mail* (April 4, 2013) A16 (characterizing Justice Karakatsanis as "struggling to make an impact" and being "a long way from pulling her judicial weight" because she had only written three decisions in her 18 months on the high court). For responses, see Patrick LeSage & Susan Lang, "Both merit praise" *The Globe and Mail* (April 5, 2013) A16: "We disagree with your criticism, both direct and indirect, concerning the contributions of Justice Karakatsanis. ... A judge's contributions should not be measured on the basis of the number of judgments written, particularly in an appellate court where collegial decision-making and judgment-writing are so important"; Morris Chochla, "Unwarranted" *The Globe and Mail* (April 10, 2013) A16: "Supreme Court Justice Andromache Karakatsanis has superb qualifications and accomplishments. ... Your criticism of Justice Karakatsanis is unwarranted."

<sup>22</sup> An exception was Minister of Justice and Attorney General Irwin Cotler, who in 2004 publicly articulated the criteria upon which candidates were identified for the "long list" and the criteria used to select the ultimate nominees for appointment. See *infra*, at 120-21.

between 2004 and 2013. It sets out the mechanisms under which each of the eight judicial appointments was made during this period.<sup>23</sup> Part III introduces the concept of a democratic audit and identifies the drivers of change to the appointments process. It argues that prior to 1992 proposed reforms to the Supreme Court amendment process were motivated by concerns about federalism: incorporating a role for the provinces in the appointment process. However, after the failure of the Charlottetown Accord (1992), the motivation changed to concerns about the “democratic deficit” so that reforming the Supreme Court appointment process became part of a democratic reform agenda proposed first by the opposition Reform Party, then by Liberal leader Paul Martin, both in his leadership campaign and during his tenure as Prime Minister, and finally by the Conservative Party led by Prime Minister Stephen Harper. This part also addresses an issue that did not factor into the reforms: any perceived deficiency in the quality of past appointments or concerns about the legitimacy of the Supreme Court itself. Since 1992, the key factors that were articulated as the basis for changing the appointment process have been (1) transparency; (2) accountability; and (3) public knowledge about the Supreme Court and its judges. These are the factors that I use for evaluation through this democratic audit.

In Part IV, I conduct the democratic audit and find that the reforms have largely failed to deliver on the promised transparency and accountability. Conversely, I also conclude that the reforms have been very successful in serving a public education function about the Supreme Court and the work that Supreme Court judges do. Part V offers my recommendations for “re-forming the reforms” in order to achieve the goals of transparency and accountability in the appointment process. I argue that the government should publish a detailed protocol to be styled *Guide to Appointment of Supreme Court Justices*, which would set out the qualifications, consultation to be followed, procedure for evaluation, etc. I propose a revamped advisory committee which would operate in a more open and transparent fashion and produce a report on their work. The public hearings of nominees should continue, but only if the Minister of Justice also appears to answer questions about the process and about why the nominee was selected. Finally, the paper ends with a brief conclusion in Part VI.<sup>24</sup>

<sup>23</sup> There are actually only six appointment “events” to be evaluated since there were double appointments in both 2004 (Abella and Charron) and 2011 (Karakatsanis and Moldaver).

<sup>24</sup> This paper was written just after the *Supreme Court Reference*, *supra*, note 3 and prior to the release of the *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32 (S.C.C.). It thus



## II. A SHORT HISTORY OF THE SUPREME COURT APPOINTMENT PROCESS, 2004-2013

The 10-year period between 2004 and the end of 2013 produced more changes to the appointment process for Supreme Court judges than any period since the Court was created in 1875. Reform of the Supreme Court appointment process began when Paul Martin became Prime Minister in December 2002. As discussed below in this Part, Martin had made reform of the Supreme Court appointment process part of his Democratic Action Plan, both as a candidate to succeed Jean Chrétien as the leader of the Liberal Party in 2002 and then as Prime Minister in 2003. The changes were first implemented with the surprise announcements by Justices Frank Iacobucci and Louise Arbour in the spring of 2004 that they both intended to step down from the Court at the end of June.<sup>25</sup>

Prior to 2004, the appointment process was closed, secretive and largely unknown and unknowable to the vast majority of Canadians.<sup>26</sup> More was known about the process for electing a new Pope than about the process for selecting a new Supreme Court justice. While vacancies were publicly known — through the public announcement of a justice's retirement or, as in the case of Justice Sopinka, by a sudden death — no information was publicly available about the selection process. The lack of transparency caused some to believe that the process was partisan,<sup>27</sup> understandably so since lack of information will lead to speculation, and speculation about politics naturally leads to pondering about partisanship

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does not consider the implications of these decisions on substantive reforms to the Supreme Court amendment process. That issue is deserving of a separate, independent paper.

<sup>25</sup> See Steven Edwards, "Arbour nomination confirmed: Supreme Court justice to be UN Rights Commissioner" *Ottawa Citizen* (February 21, 2004) A3 and Tonda MacCharles, "Supreme Court judge Iacobucci to retire; Two Ontario seats now open on bench Martin break replacement promise" *The Toronto Star* (March 23, 2004) A6. Both announcements came as a surprise because Justice Iacobucci could have served on the Court until 2012 and Justice Arbour until 2022. Justice Iacobucci had served on the high court for 13 years and the announcement of his departure was less surprising than that of Justice Arbour, who had served on the Court for less than five years at the time she announced her resignation. See The Supreme Court of Canada, "The Honourable Mr. Justice Frank Iacobucci", online: <<http://www.scc-csc.gc.ca/court-cour/judges-juges/bio-eng.aspx?id=frank-iacobucci>> and The Supreme Court of Canada, "The Honourable Madam Justice Louise Arbour", online: <<http://www.scc-csc.gc.ca/court-cour/judges-juges/bio-eng.aspx?id=louise-arbour>>.

<sup>26</sup> Former Minister of Justice Irwin Cotler admitted that the consultative process for Supreme Court appointments was "never well known — indeed, it may be said to have been relatively unknown". Cotler, "The Supreme Court Appointment Process", *supra*, note 2, at 136.

<sup>27</sup> Cotler, "The Supreme Court Appointment Process", *id.*

and patronage. Jacob Ziegel rightly described the process as one “shrouded in vagueness, and unsubstantiated rumour and gossip”.<sup>28</sup>

In March 2004, Minister of Justice Irwin Cotler appeared before the House of Commons Standing Committee on Justice and Human Rights examining the Supreme Court appointment process and lifted the shroud that had hidden the process from public view for so long.<sup>29</sup> Minister Cotler’s testimony was both historic and illuminating in shining significant light on the process.<sup>30</sup> In his testimony, Cotler explained that

... what I would like to do now, in the interests of both transparency and accountability, is to describe to you the consultative process or protocol of consultation that is being used to select members of the Supreme Court. I cannot claim, nor would I, that this consultative process or protocol has always been followed in every particular. I can only undertake to follow it as the protocol by which I will be governed as

<sup>28</sup> Jacob S. Ziegel, “Merit Selection and Democratization of Appointments to the Supreme Court of Canada” (June 1999) 5:2 Choices 3, at 6 [hereinafter “Ziegel, ‘Merit Selection’”]. Ziegel posed many questions about the process:

Obviously, the Minister of Justice is involved and so, we are told, is the Prime Minister’s Office, since by convention the Prime Minister makes the actual decision. If that is the case, does the Cabinet do more than simply rubber stamp the Prime Minister’s choice? What role does the Chief Justice of Canada play? To what extent does the Minister of Justice confer with the attorney general or attorneys general of the province or the region from which the candidate is to be appointed? What is the role of lobbyists for special interests or on behalf of specific candidates? In the Charter era, how much attention does the federal government pay to the constitutional philosophy of prospective appointees? There are no sure answers to any of these questions.

*Id.* If someone as knowledgeable as Professor Ziegel did not know the answers to these questions, we can assume that few experts and even fewer members of the public did.

<sup>29</sup> The Committee itself described Cotler’s appearance as “the first time that [the Supreme Court appointments process] had been made public. Canadians had their first opportunity to learn who was consulted about Supreme Court appointments and the criteria by which candidates are assessed for their fitness to be a Justice.” Canada, Report of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Appointments Process* (Ottawa: Communication Group, 2004), at 5 (Chair: Derek Lee, MP), online: Parliament of Canada, <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1350880&Language=E&Mode=1&Parl=37&Ses=3>>. See also Peter W. Hogg, “Appointment of Thomas A. Cromwell to the Supreme Court of Canada” in J. Cameron, P. Monahan & B. Ryder, eds. (2009) 47 S.C.L.R. (2d) 413.

<sup>30</sup> My colleague Carissima Mathen was less impressed with Mr. Cotler’s appearance. She called the process

not exactly revealing. The Minister essentially offered assurances that Supreme Court appointments were not random. They did not involve the equivalent of the Prime Minister picking a name from a legal directory or appointing his favourite bridge partner. Instead, the Prime Minister’s Office (through the Minister of Justice) talked with some people about other people, gathered some names, looked over anything those people may have written, and eventually made a decision. The candidates were not even interviewed.

Mathen, “Choices and Controversy”, *supra*, note 14, at 57 (citation omitted).

Minister of Justice. I might add that this is the first time that this protocol or appointments protocol is being released, which I would say is yet another expression of the beneficiary of this parliamentary review.

The first step taken in this appointments process is the identification of prospective candidates. As you are aware, candidates come from the region where the vacancy originated — be it the Atlantic, Ontario, Quebec, the Prairies and the North, and British Columbia regions. This is a matter of convention, except for Quebec, where the Supreme Court Act establishes a requirement that three of the justices must come from Quebec.

The candidates are drawn from judges of the courts of jurisdiction in the region, particularly the courts of appeal, as well as from senior members of the bar and leading academics in the region. Sometimes, names may be first identified through previous consultations concerning other judicial appointments.

In particular, Mr. Chairman, the identification and assessment of potential candidates is based on a broad range of consultations with various individuals. As Minister of Justice, I consult with the following: the Chief Justice of Canada and perhaps other members of the Supreme Court of Canada, the chief justices of the courts of the relevant region, the attorneys general of the relevant region, at least one senior member of the Canadian Bar Association, and at least one senior member of the law society of the relevant region.

I may also consider input from other interested persons, such as academics and organizations who wish to recommend a candidate for consideration. Anyone is free to recommend candidates, and indeed, some will choose to do so by way of writing to the Minister of Justice, for example.

The second step is assessment of the potential candidates. Here, the predominant consideration is merit. In consultation with the Prime Minister, I use the following criteria, divided into three main categories: professional capacity, personal characteristics, and diversity.

Let me begin with professional capacity. Under the heading of professional capacity are the following considerations, and I will just cite them: highest level of proficiency in the law, superior intellectual ability and analytical and written skills; proven ability to listen and to maintain an open mind while hearing all sides of the argument; decisiveness and soundness of judgment; capacity to manage and share consistently heavy workload in a collaborative context; capacity to manage stress and the pressures of the isolation of the judicial role; strong cooperative interpersonal skills; awareness of social context; bilingual capacity; and specific expertise required for the Supreme Court. Expertise can be identified by the court itself or by others.

As I mentioned, Mr. Chairman, this goes to what might be called the professional capacity. This is the comprehensive set of criteria here. Not every candidate must have each of these criteria. This is the composite set of criteria through which evaluation takes place.

[*Translation*]

Under the rubric of personal qualities, the following factors are considered: impeccable personal and professional ethics, honesty, integrity and forthrightness; respect and regard for others, patience, courtesy, tact, humility, impartiality and tolerance; personal sense of responsibility, common sense, punctuality and reliability.

The diversity criterion concerns the extent to which the court's composition adequately reflects the diversity of Canadian society.

[*English*]

Mr. Chairman, these are the criteria.

In reviewing the candidates, I may also consider jurisprudential profiles prepared by the Department of Justice. These are intended to provide information about the volume of cases written, areas of expertise, the outcome of appeals of the cases, and the degree to which they have been followed in the lower courts.

After the above assessments and consultations, as I've described, are completed, I discuss the candidates with the Prime Minister. There may also have been previous exchanges with the Prime Minister. Indeed, I may be involved in a consultation more than once with a range of persons with whom I've indicated that I engaged in consultations. A preferred candidate is then chosen. The Prime Minister, in turn, recommends a candidate to cabinet and the appointment proceeds by way of an order in council appointment, as per the Constitution.

This concludes the description of the current protocol or appointment process, which I'm sharing with you.<sup>31</sup>

Cotler explained "the old process" at the same time as work was underway within government to reform it and create a new process for appointing Supreme Court judges.

Cotler appeared before the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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<sup>31</sup> Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 37th Parl., 3rd Sess., March 30, 2004 (The Hon. Irwin Cotler), reproduced in Cotler, "The Supreme Court Appointment Process", *supra*, note 2.

("Justice Committee") because earlier that month Prime Minister Paul Martin's Minister of Democratic Reform, the Honourable Jacques Saada, asked that committee for "recommendations on how best to implement prior review of Supreme Court of Canada Justices".<sup>32</sup> The Justice Committee also heard testimony from retired Supreme Court justice Claire L'Heureux-Dubé and from academics. It produced a report that recommended that as an interim process the Minister of Justice appear before the committee to explain both the process followed for filling the vacancies and the qualifications of the two nominees. The committee report further recommended a more permanent process involving the creation of an advisory committee composed of MPs from each official party, representation from the provinces, members of the judiciary, the legal profession and lay members which would provide the Minister of Justice with a shortlist of candidates for appointment. Again, the Minister of Justice would appear before the committee to explain both the process and the appointee's qualifications.<sup>33</sup> Each of the Conservative Party, Bloc Québécois and New Democratic Party ("NDP") filed dissenting opinions to the effect that the recommendations did not go far enough in various respects.<sup>34</sup>

Initially, Prime Minister Martin announced that he intended to give MPs a role in screening the nominees that he selected for the Supreme Court.<sup>35</sup> However, with a federal election intervening and pressure on the government to have the vacancies filled by the end of the summer, the federal government backtracked from its reform plans and put in place an

<sup>32</sup> See Letter to Mr. Derek Lee, Chair, House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, March 16, 2004, online: <[http://epe.lac-bac.gc.ca/100/205/301/prime\\_minister-ef/paul\\_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=121](http://epe.lac-bac.gc.ca/100/205/301/prime_minister-ef/paul_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=121)>. The letter asked the House Justice Committee to "undertake a review and report to the House of Commons with recommendations on this matter as soon as possible. I would ask that you consult with the Minister of Justice and parliamentarians from both Chambers as part of this review." *Id.* See also Office of the Prime Minister, News Release, "Parliament to Review Appointments" (March 16, 2004), online: <[http://epe.lac-bac.gc.ca/100/205/301/prime\\_minister-ef/paul\\_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=119](http://epe.lac-bac.gc.ca/100/205/301/prime_minister-ef/paul_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=119)>. The Justice Committee had previously begun looking at the appointment process for all judicial appointments pursuant to a motion referred to the Justice Committee from the House of Commons originally moved by Bloc Québécois MP and Justice Committee member Richard Marceau. See Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 37th Parl., 3rd Sess., March 23, 2004 (Mr. Derek Lee, Chair).

<sup>33</sup> See House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Appointment Process* (May 2004), 37th Parl. 3d Sess. (Mr. Derek Lee, Chair).

<sup>34</sup> *Id.*

<sup>35</sup> See Janice Tibbetts, "Martin determined to let MPS screen judges" *National Post* (May 17, 2004) A4.

interim process as recommended by the Justice Committee whereby the Prime Minister would select the nominees and the Minister of Justice would appear before a committee of MPs.<sup>36</sup>

Thus, in August 2004, Minister of Justice Irwin Cotler appeared before an interim *Ad Hoc* Committee on the Appointment of Supreme Court Judges to explain both the process that led to the Prime Minister's selection of Justices Abella and Charron as well as the basis for selecting them.<sup>37</sup> The committee was composed of seven MPs plus a representative of the Canadian Judicial Council and the Law Society of Upper Canada.<sup>38</sup> The panel questioned Minister Cotler and prepared a report, with dissenting opinions expressed about the process, not the nominees. The Prime Minister then formally appointed Justices Abella and Charron to the Supreme Court.<sup>39</sup>

In 2005, Cotler introduced a "permanent reform" process consisting of four stages. In the first stage, the Minister was to conduct the same sort of consultations and review as in the past with a view to creating a "long list" of five to eight candidates. In the second stage, an Advisory Committee was to assess the candidates and produce a confidential short list of three names "along with a commentary of the strengths and

<sup>36</sup> See Kim Lunman & Brian Laghi, "Commons panel to accept judges, but wants stronger vetting process" *The Globe and Mail* (August 26, 2004) A1; Tonda MacCharles, "Naming process draws fire; Justice minister to face special hearing today Charron, Abella picked for skills in public, private law" *The Toronto Star* (August 25, 2004) A7; Kim Lunman & Michael Valpy, "MPs will scrutinize top-court nominees" *The Globe and Mail* (August 24, 2004) A1; Kim Lunman, "MPs working on hearings for top-court nominees" *The Globe and Mail* (August 23, 2004) A4. See generally Irwin Cotler, P.C., M.P. & Charlie Feldman, "Supreme Court Appointments: When and How Should Parliament Exercise Oversight?" (March 2014) 8 J.P.P.L. 253, at 267 [hereinafter "Cotler & Feldman"].

<sup>37</sup> Speaking Notes for Irwin Cotler Minister of Justice and Attorney General of Canada, on the Occasion of a Presentation to the Ad Hoc Committee on Supreme Court Appointments, August 24, 2004, Ottawa, online: <[http://www.collectionscanada.gc.ca/webarchives/20071116083626/http://www.canada.justice.gc.ca/en/news/sp/2004/doc\\_31212.html](http://www.collectionscanada.gc.ca/webarchives/20071116083626/http://www.canada.justice.gc.ca/en/news/sp/2004/doc_31212.html)>. The Minister appeared before an *ad hoc* committee rather than a parliamentary committee because there had been a general election in June 2004 and the 37th Parliament was dissolved on May 23, 2004. The 38th Parliament was not summoned into session until October 4, 2004. See Parliament of Canada, PARLINFO, Parliaments, online: <<http://www.parl.gc.ca/parlinfo/Lists/Parliament.aspx>>.

<sup>38</sup> See *Report of the Interim Ad Hoc Committee on the Appointment of Supreme Court Judges*, Appendix A, August 2004, online: <<http://www.justice.gc.ca/eng/rp-pr/cp-pm/cr-rc/scj2-jcs2/>>. Chief Justice John Richard of the Federal Court of Appeal served as the Canadian Judicial Council's representative and Julian Porter served as the Law Society of Upper Canada's representative. See also Cotler & Feldman, *supra*, note 36, at 267-68.

<sup>39</sup> See *Report of the Interim Ad Hoc Committee on the Appointment of Supreme Court Judges*, Appendix A, *id.*, and Kim Lunman, "Top-court nominees endorsed – but not by all" *The Globe and Mail* (August 27, 2004) A5.

weaknesses of each candidate” to the Minister. The Committee was also to provide the Minister with the complete record of consultations and other material upon which it relied. The Minister could request the Committee to undertake further consultations if the Minister felt they were incomplete.<sup>40</sup> In the third stage, the Prime Minister, with the advice of the Minister of Justice, would select and appoint a candidate from the short list.<sup>41</sup> In the fourth stage, the Minister of Justice would appear before a committee to explain both the process and the selection.

The Liberals had the opportunity to put their plan into action when Justice Major announced his retirement in August 2005, effective Christmas Day later that year.<sup>42</sup> Minister of Justice Irwin Cotler consulted with the persons previously identified and created a list of five to eight candidates which he sent to the Advisory Committee that he created.<sup>43</sup> The Advisory Committee was composed of four MPs (one from each of the recognized political parties in the House of Commons), one retired judge nominated by the Canadian Judicial Council, one member nominated by the provincial Attorneys General in the region, one member nominated by the provincial law societies in the region and “two eminent people of recognized stature in the region” nominated by the Minister of Justice of Canada.<sup>44</sup> Minister Cotler apparently gave the Advisory Committee a mandate letter, “setting out

<sup>40</sup> Cotler, “The Supreme Court Appointment Process”, *supra*, note 2, at 144-45.

<sup>41</sup> *Id.*, at 145. According to the protocol established by Minister Cotler, there was a proviso for “exceptional circumstances” which would allow the government to select a candidate not on the short list. *Id.*

<sup>42</sup> See Supreme Court of Canada, News Release (August 3, 2005), online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/2061/index.do>>; and Cristin Schmitz, “Race begins after resignation opens spot on Supreme Court” *The Gazette* (August 3 2005) A10.

<sup>43</sup> Cotler, “The Supreme Court Appointment Process” *supra*, note 2, at 143. Elsewhere it is asserted that Minister Cotler created a long list of eight candidates for the Justice Major vacancy. See Ben Alarie & Andrew Green, “Policy Preference Change and Appointments to the Supreme Court of Canada” (2009) 47 *Osgoode Hall L.J.* 1, at para. 7 [hereinafter “Alarie & Green, ‘Policy Preference’”].

<sup>44</sup> Cotler, *id.*, at 143; Canada, Department of Justice, News Release, “New Supreme Court of Canada Appointments Process Launched” (August 8, 2005), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116083829/http://www.canada.justice.gc.ca/en/news/nr/2005/doc\\_31586.html](http://www.collectionscanada.gc.ca/webarchives/20071116083829/http://www.canada.justice.gc.ca/en/news/nr/2005/doc_31586.html)>. For the members of the Advisory Committee see Canada, Department of Justice, News Release, “Minister of Justice Announces Members of New Advisory Committee for Next Supreme Court Appointment” (October 11, 2005), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116092711/http://www.canada.justice.gc.ca/en/news/nr/2005/doc\\_31640.html](http://www.collectionscanada.gc.ca/webarchives/20071116092711/http://www.canada.justice.gc.ca/en/news/nr/2005/doc_31640.html)> and Canada, Department of Justice, Backgrounder, “Members of the Advisory Committee on Supreme Court of Canada Appointments” (October 11, 2005), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116092120/http://www.canada.justice.gc.ca/en/news/nr/2005/doc\\_31642.html](http://www.collectionscanada.gc.ca/webarchives/20071116092120/http://www.canada.justice.gc.ca/en/news/nr/2005/doc_31642.html)>.

the objectives of the Committee, describing the merit-based criteria, establishing timeframes and providing for a general procedure, particularly in relation to confidentiality".<sup>45</sup> Cotler also apparently met with the Committee before it began its work.<sup>46</sup>

The Advisory Committee shortened the list to three names after reviewing the résumés and publications of the candidates and consulting with third parties (the same persons the Minister had consulted with earlier). The committee submitted its list to Minister of Justice Cotler, but the Liberal government fell at the end of November 2005 and after an election in January 2006, the Conservative Party led by Stephen Harper formed the government. The new Harper government chose Justice Rothstein from the shortlist but, in a deviation from the Liberal plan, had the nominee appear, instead of the Minister of Justice, before an *ad hoc* parliamentary committee.<sup>47</sup>

Justice Rothstein thus became the first nominee ever to appear for a public hearing prior to being appointed to the Supreme Court. He appeared not before a parliamentary committee but before an *ad hoc* committee of parliamentarians composed of MPs from the political parties in proportion to their representation in the House.<sup>48</sup> Professor Peter

<sup>45</sup> Cotler, *id.*, at 143-44.

<sup>46</sup> *Id.*, at 144.

<sup>47</sup> Prime Minister's Office, News Release, "Supreme Court nominee to face questions from Parliamentarians" (February 20, 2006), online: <<http://pm.gc.ca/eng/media.asp?id=1025>>; Prime Minister's Office, News Release, "Prime Minister Harper announces nominee for Supreme Court appointment" (February 23 2006), online: <<http://pm.gc.ca/eng/news/2006/02/23/prime-minister-harper-announces-nominee-supreme-court-appointment>>. Minister of Justice Toews (as he then was) was present at the hearing but he did not take questions from the parliamentarians. He explained the process and the basis for the Prime Minister's selection of Justice Rothstein. I am not enamoured of the nomenclature "parliamentary hearing" to describe the questioning of Justice Rothstein and of successive nominees. The hearing involves parliamentarians but it is not governed in any way by the rules of Parliament, and the term gives the misleading impression that Parliament as an institution has some role in the process. The process is accurately described as "*ad hoc*" and, given the function that the hearings have served to date, the participants needed not be parliamentarians. Indeed, for reasons described in Part IV, the composition of the *ad hoc* committees has been problematic because of the overlap in membership between the selection/advisory committees and the *ad hoc* committees. The "parliamentary hearings" have been more akin to a television interview than to a parliamentary hearing.

<sup>48</sup> Prime Minister's Office, News Release, "Prime Minister announces appointment of Mr. Justice Marshall Rothstein to the Supreme Court" (March 1, 2006), online: <<http://pm.gc.ca/eng/media.asp?id=1041>>; Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008), at 18 [hereinafter "Songer"].



Hogg supervised the proceedings, providing introductory comments “on the limits of judicial speech”, in order to guide the committee “as to the kinds of questions that could or could not be answered by the nominee”.<sup>49</sup> The members of the committee were free to ask Justice Rothstein any questions, but as per Professor Hogg’s admonitions, they were aware that Justice Rothstein had the prerogative to decline to answer questions involving issues that could be put before him on the Supreme Court.

The three-hour hearing was televised live and was widely considered a tame affair, in part due to Justice Rothstein’s amiable personality and self-deprecating style.<sup>50</sup> The committee did not vote on the appointment and did not produce a report, although Minister of Justice Vic Toews did invite the MPs to share their views with the Prime Minister, who reportedly watched the proceedings on television. The Prime Minister confirmed Justice Rothstein’s appointment two days after the hearing.<sup>51</sup>

Two years elapsed before the Harper government would have another chance to fill a vacancy on the high court. In the interim, it did not make any formal policies or issue any plans on how it would approach the appointment process. This became apparent after April 9, 2008, when Justice Michel Bastarache announced that he would be stepping down from the Supreme Court, effective June 30, 2008.<sup>52</sup> More than six weeks later, the Minister of Justice announced the following process to replace Justice Bastarache. First, the Minister of Justice and Attorney General would consult with the Attorneys General of the four Atlantic provinces as well as leading members of the legal

<sup>49</sup> Peter W. Hogg, “Appointment of Justice Marshall Rothstein to the Supreme Court of Canada” (2006) 44 Osgoode Hall L.J. 527, at 528, 531 [hereinafter “Hogg, ‘Appointment of Justice Marshall Rothstein’”]. A copy of Hogg’s opening remarks to the Committee is appended to his 2006 article. See also House of Commons, Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada, News Release (Transcript), (February 27 2006), online: <[http://www.collectionscanada.gc.ca/webarchives/20071125225650/http://www.justice.gc.ca/en/news/sp/2006/doc\\_31772\\_1.html](http://www.collectionscanada.gc.ca/webarchives/20071125225650/http://www.justice.gc.ca/en/news/sp/2006/doc_31772_1.html)>.

<sup>50</sup> For critical comments on the Justice Rothstein hearing, see Mathen, “Choices and Controversy”, *supra*, note 14, and Michael Plaxton, “The Neutrality Thesis and the Rothstein Hearing” (2008) 58 U.N.B.L.J. 92 [hereinafter “Plaxton, ‘The Neutrality Thesis’”].

<sup>51</sup> Prime Minister’s Office, News Release, “Prime Minister announces appointment of Mr. Justice Marshall Rothstein to the Supreme Court” (March 1, 2006), online: <<http://pm.gc.ca/eng/media.asp?id=1041>>; Songer, *supra*, note 48, at 18.

<sup>52</sup> Supreme Court of Canada, News Release (April 9, 2008), online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/2798/index.do>>.

community. Members of the public were invited to submit their input through a Department of Justice website. Based on this process, the Minister would prepare a list of an unspecified number of qualified candidates which would be reviewed by a selection panel composed of five MPs — including two Members from the government caucus and one member from each of the recognized Opposition caucuses, as selected by their respective leaders. This body — known for the first time as “the Supreme Court Selection Panel” — was tasked with the responsibility for assessing the candidates and providing an unranked short list of three qualified candidates to the Prime Minister of Canada and the Minister of Justice for their consideration. Finally, the nominee was to appear at a public hearing of an *ad hoc* parliamentary committee, as did Justice Rothstein.<sup>53</sup>

The Minister of Justice completed his consultations and submitted his list of qualified candidates to the Supreme Court Selection Panel. That body was beset by partisan bickering and on September 5, 2008, the Prime Minister bypassed the panel and announced Justice Cromwell as the nominee for appointment. The Prime Minister stated that an appointment would not be made until Justice Cromwell appeared at a public hearing of an *ad hoc* parliamentary committee.<sup>54</sup> Two days later, the Prime Minister asked the Governor General to dissolve Parliament, triggering an election October 14, 2008. Soon after Parliament reconvened in November, Canada was beset by a parliamentary crisis and on December 4, 2008, the Governor General prorogued Parliament at the Prime Minister's request.<sup>55</sup> Prime Minister Harper dispensed with the parliamentary hearing and on December 22, 2008, he formally appointed Justice Cromwell to the Supreme Court.<sup>56</sup> Given fractious and fragile parliamentary relations and the wide support for Justice Cromwell, there

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<sup>53</sup> Department of Justice of Canada, News Release, “Minister of Justice Announces Selection Process for the Supreme Court of Canada” (May 28, 2008), online: <<http://www.marketwired.com/press-release/minister-of-justice-announces-selection-process-for-the-supreme-court-of-canada-862003.htm>>.

<sup>54</sup> Prime Minister of Canada, Press Release, “PM Announces Nominee for Supreme Court Appointment” (September 5, 2008), online: <<http://pm.gc.ca/eng/news/2008/09/05/pm-announces-nominee-supreme-court-appointment>>.

<sup>55</sup> See generally Peter H. Russell & Lorne M. Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

<sup>56</sup> Government of Canada, News Release, “Prime Minister Harper announces appointment of Thomas Cromwell to Supreme Court of Canada” (December 22, 2008).

was minimal criticism of the Prime Minister's dispensing with the process for parliamentary consultation and hearing.<sup>57</sup>

On May 13, 2011, a newly re-elected Conservative government was suddenly faced with two vacancies. Justices Ian Binnie and Louise Charron jointly announced their retirement on what would otherwise have been a sleepy post-election Friday afternoon.<sup>58</sup> The Prime Minister instituted the following process. First, the Minister of Justice and Attorney General would consult with the Attorney General of Ontario as well as leading members of the legal community in order to identify a pool of qualified candidates for appointment to the Supreme Court. Members of the public were invited to submit their input regarding candidates through a Department of Justice website. Based on this process, the Minister of Justice would create a list of unspecified numbers of qualified candidates. Second, this "long list" of qualified candidates would be reviewed by a selection panel composed of five MPs: three government MPs and one from each of the opposition parties, the NDP and the Liberals, as selected by the leaders of those parties. The Supreme Court Selection Panel was tasked with assessing the candidates and providing an unranked short list of six qualified candidates to the Prime Minister and the Minister of Justice for their consideration. Third, while it was unstated, it was implied that the Prime Minister and Minister of Justice would only make a selection of a "nominee" from this shortlist. Fourth, the selected "nominees" would appear at a public hearing of *ad hoc* parliamentary committee to answer questions from MPs as Justice Rothstein had done in 2006.<sup>59</sup>

This process was followed in 2011 for the appointments of Justices Moldaver and Karakatsanis,<sup>60</sup> in 2012, for the appointment of Justice

<sup>57</sup> See, e.g., Janice Tibbetts, "Justice can no longer be delayed" *Edmonton Journal* (December 23, 2008) A7; Kirk Makin, "Top-court appointment process bypasses review process" *The Globe and Mail* (December 23, 2008) A4; Editorial, "Hurry, without hearing" *The Globe and Mail* (December 23, 2008) A14; Editorial, "Harper abandons zeal for reform" *The Toronto Star* (December 26, 2008) A57; David Asper, "Picking the lesser evil" *National Post* (December 27, 2008) A25.

<sup>58</sup> See Supreme Court of Canada, "News Release" (May 13, 2011), online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/3701/index.do>>; Prime Minister of Canada, "Statement by the Prime Minister of Canada on the Upcoming Retirement of Two Supreme Court Judges" (May 13, 2011), online: <<http://pm.gc.ca/eng/news/2011/05/13/statement-prime-minister-canada-upcoming-retirement-two-supreme-court-judges>> [hereinafter "Prime Minister of Canada, 'Upcoming Retirement'"]. The announcement was surprising because Justice Binnie did not have to retire until 2014 and Justice Charron until 2026.

<sup>59</sup> Prime Minister of Canada, "Upcoming Retirement", *id.*

<sup>60</sup> *Id.*

Wagner<sup>61</sup> and in 2013 for the appointment of Justice Nadon.<sup>62</sup> The Office of Federal Judicial Affairs — the body that oversees and administers federal judicial appointments — administers the appointment process, at least respecting the Selection Panel.<sup>63</sup> It is not clear what role the Office of Federal Judicial Affairs plays in compiling the long list. In each of those appointments, the hearing took place two days after the Prime Minister's announcement of the nominee. In 2011, Professor Peter Hogg reprised the role of counsel to the parliamentary committee that he had performed in 2006 at the Rothstein hearing. In both 2012 and 2013, former Quebec Court of Appeal Justice Jean-Louis Baudouin exercised this function. The day after each of these hearings, the Prime Minister formally appointed his nominee to the Supreme Court.<sup>64</sup>

Thus, as seen in Table 1, between 2004 and 2013, various appointment processes were used. However, since 2011, the Government seems to have settled on a process involving a "Supreme Court Selection Panel" consisting of five MPs and an *ad hoc* committee of MPs which questions the "nominee" at a public hearing.

<sup>61</sup> Prime Minister of Canada, "Statement by the Prime Minister of Canada on the Retirement of Justice Marie Deschamps" (May 18, 2012), online: <<http://pm.gc.ca/eng/news/2012/05/18/statement-prime-minister-canada-retirement-justice-marie-deschamps>> [hereinafter "Prime Minister of Canada, 'Justice Marie Deschamps'"].

<sup>62</sup> Prime Minister of Canada, "Statement by the Prime Minister of Canada on the Retirement of Justice Morris Fish" (April 23, 2013), online: <<http://www.pm.gc.ca/eng/news/2013/04/23/statement-prime-minister-canada-retirement-justice-morris-fish>> [hereinafter "Prime Minister of Canada, 'Justice Morris Fish'"].

<sup>63</sup> According to the Federal Judicial Affairs website, "The Minister of Justice has given FJA the mandate to administer the Supreme Court of Canada Appointments Selection Panel process, established to evaluate candidates for appointment to the Supreme Court of Canada." Office of the Commissioner of Federal Judicial Affairs, "Our Role", online: <<http://www.fja-cmf.gc.ca/fja-cmf/role-eng.html>>.

<sup>64</sup> Strictly speaking, Supreme Court judges are appointed by the Governor in Council. See *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 4(2). The Governor in Council is the Governor General acting on the advice of the Queen's Privy Council for Canada, *i.e.*, the federal cabinet. See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 13 (reprinted in R.S.C. 1985, App. II, No. 5). See generally Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Toronto: Carswell, 2007), at § 9.4(b) [hereinafter "Hogg, *Constitutional Law of Canada*"]. The Prime Minister advises the Governor General on behalf of the Queen's Privy Council for Canada. It has become clear that the choice of all Supreme Court judges is the personal prerogative of the Prime Minister. See A. Anne McLellan, "Foreword" (2000) 38 Alta. L. Rev. 603, at 604 [hereinafter "McLellan, 'Foreword'"]; Cotler, "The Supreme Court Appointment Process", *supra*, note 2; and Tonda MacCharles, "Supreme Court pick defends qualifications: Justice Marc Nadon concedes he doesn't meet any diversity expectations for upper chamber" *The Toronto Star* (October 3, 2013) A28 (stating that Justice Minister Peter MacKay noted that the selection of Supreme Court justices was the decision of the Prime Minister) [hereinafter "MacCharles, 'Supreme Court pick defends qualifications'"].

**Table 1: Modes of Appointment of Supreme Court Judges  
2004–2013**

Judge (Year)	Advisory Committee	Public Hearing	Others
Abella and Charron (2004)	No	Yes. Minister of Justice appeared before <i>ad hoc</i> committee.	
Rothstein (2006)	Yes. 4 MPs, 1 provincial rep, 1 retired judge, 1 Law Society rep, 2 public	Yes. Nominee appeared before <i>ad hoc</i> committee of parliamentarians and judicial and law society representatives.	
Cromwell (2008)	No	No	Prime Minister had intended to proceed with both advisory committee and public hearing
Karakatsanis and Moldaver (2011)	Yes. 5 MPs (3 Conservative, 1 NDP, 1 Liberal)	Yes. Nominees appeared before <i>ad hoc</i> committee of MPs.	
Wagner (2012)	Yes. 5 MPs (3 Conservative, 1 NDP, 1 Liberal)	Yes. Nominee appeared before <i>ad hoc</i> committee of MPs.	
Nadon (2013)	Yes. 5 MPs (3 Conservative, 1 NDP, 1 Liberal)	Yes. Nominee appeared before <i>ad hoc</i> committee of MPs.	

### III. DEMOCRATIC AUDIT AND DRIVERS OF CHANGE

#### 1. The Concept of a Democratic Audit

The concept of a democratic audit of Canadian political institutions was conceived by a group of political scientists in the first decade of the 21st century in response to two apparently contradictory phenomena: the increasing identification of a “democratic deficit” among political leaders, government commissions, academics, citizen groups and the media,

and the continued veneration of Canadian democracy around the world.<sup>65</sup> Led by Professor William Cross, Bell Chair for the Study of Canadian Parliamentary Democracy at Carleton University, the Canadian Democratic Audit series audited Canadian federalism,<sup>66</sup> legislatures,<sup>67</sup> cabinets and first ministers,<sup>68</sup> citizens,<sup>69</sup> elections,<sup>70</sup> political parties,<sup>71</sup> advocacy groups,<sup>72</sup> communications technology,<sup>73</sup> and the courts.<sup>74</sup>

The participants in the Canadian Democratic Audit selected participation, inclusiveness and responsiveness as the audit benchmarks to evaluate the particular feature of Canadian democracy.<sup>75</sup> They chose these benchmarks based on normative considerations of the meaning of democracy that they believed were relevant to Canada in the 21st century. In defending their choice of the above three benchmarks, they explained: "We believe that any contemporary definition of Canadian democracy must include institutions and decision-making practices that are defined by public participation, that this participation must include all Canadians, and that government outcomes must respond to the views of Canadians."<sup>76</sup>

While these benchmarks are instructive, I do not adopt them for purposes of my "audit" of changes to the Supreme Court appointment process over the past decade. Rather, I am inspired by the idea and the methodology of the democratic audit. Instead, I have selected the following three benchmarks: (1) transparency; (2) accountability; and (3) the promotion of public knowledge about the work of the Supreme Court of Canada and its judges.

<sup>65</sup> See William Cross, "Foreword" in Ian Greene, *The Courts* (Vancouver: UBC Press, 2006) vii, at vii [hereinafter "Greene, *The Courts*"]. This Foreword is contained in each of the nine substantive volumes of The Canadian Democratic Audit Series identified in notes 66-74, *infra*. See generally William Cross, "Constructing the Canadian Democratic Audit" in William Cross, ed., *Auditing Canadian Democracy* (Vancouver: UBC Press, 2010) 1 at 1-11.

<sup>66</sup> Jennifer Smith, *Federalism* (Vancouver: UBC Press, 2004).

<sup>67</sup> David Docherty, *Legislatures* (Vancouver: UBC Press, 2005).

<sup>68</sup> Graham White, *Cabinets and First Ministers* (Vancouver: UBC Press, 2005).

<sup>69</sup> Elizabeth Gidengil *et al.*, *Citizens* (Vancouver: UBC Press, 2004).

<sup>70</sup> John Courtney, *Elections* (Vancouver: UBC Press, 2004).

<sup>71</sup> William Cross, *Political Parties* (Vancouver: UBC Press, 2004).

<sup>72</sup> Lisa Young & Joanna Everitt, *Advocacy Groups* (Vancouver: UBC Press, 2004).

<sup>73</sup> Darin Barney, *Communication Technology* (Vancouver: UBC Press, 2005).

<sup>74</sup> See Ian Greene, *The Courts* (Vancouver: UBC Press, 2006).

<sup>75</sup> William Cross, "Constructing the Canadian Democratic Audit" in William Cross, ed., *Auditing Canadian Democracy* (Vancouver: UBC Press, 2010) 1, at 1.

<sup>76</sup> William Cross, "Foreword" in Ian Greene, *The Courts*, *supra*, note 65, at vii. This Foreword is contained in each of the nine substantive volumes of The Canadian Democratic Audit Series identified in notes 66-74, *supra*.

I have selected transparency and accountability because these values were and continue to be the dominant factors, concerns about which precipitated changes to the appointment process and that continue to be used to justify those changes, as expressed in the statement by Prime Minister Harper in the quote at the beginning of this paper.<sup>77</sup> For example, in announcing the members of the Selection Panel to advise on the appointment to fill the vacancy created by Justice Fish's retirement in 2013, the Justice Canada News Release stated: "The Selection Panel plays a critical role in ensuring transparency and balance in the Supreme Court appointment process."<sup>78</sup> The exact same language was used in 2012 upon the retirement of Justice Deschamps,<sup>79</sup> and in 2011 upon the retirement of Justices Binnie and Charron.<sup>80</sup> I am not alone in asserting that the reforms were intended to increase transparency and accountability.<sup>81</sup>

As discussed in Part III.4, promoting public knowledge about the work of the Supreme Court of Canada and its judges was not a causal factor in precipitating the changes ushered in by the Martin government and continued by the Harper government. However, since 2004, it has been invoked as an explanatory factor for the changes. Thus, when Peter Hogg opened the proceedings for MPs to interview Justice Rothstein in February 2006, he stated that the purpose of the new process was "to make appointments to the Court more open, and to promote public

<sup>77</sup> News Release, "Prime Minister announces appointment of Mr. Justice Marshall Rothstein to the Supreme Court" (March 1, 2006), online: <<http://pm.gc.ca/eng/news/2006/03/01/prime-minister-announces-appointment-mr-justice-marshall-rothstein-supreme-court>> [hereinafter "Appointment of Mr. Justice Marshall Rothstein"]; "The way in which Justice Rothstein was appointed marks an historic change in how we appoint judges in this country. It brought unprecedented openness and accountability to the process. The hearings allowed Canadians to get to know Justice Rothstein through their members of Parliament in a way that was not previously possible."

<sup>78</sup> Justice Canada, News Release: "Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel" (June 11 2013), online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc\\_32908.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32908.html)>.

<sup>79</sup> Justice Canada, News Release, "Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel" (August 8, 2012), online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc\\_32776.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32776.html)>.

<sup>80</sup> Justice Canada, News Release, "Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel" (August 5, 2011), online: <[http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc\\_32624.html](http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32624.html)>.

<sup>81</sup> See Plaxton, "The Neutrality Thesis", *supra*, note 50, at 97 (asserting that the new appointments process was supposed to generate greater transparency and accountability); Lorne Sossin, "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability" (2008) 58 U.N.B.L.J. 11, at 33 (stating that the hearing process created by Prime Minister Harper in 2006 ensures that there is a forum for political accountability to play a role in the appointments process) [hereinafter "Sossin, 'Judicial Appointment'"].

knowledge of the judges of the Court".<sup>82</sup> And when after those hearings, the Prime Minister formally announced the appointment of Justice Rothstein to the Court, the Prime Minister stated that "[t]he hearings allowed Canadians to get to know Justice Rothstein through their members of Parliament in a way that was not previously possible".<sup>83</sup> Similar statements were repeated in the appointments of 2011, 2012 and 2013.<sup>84</sup>

Other benchmarks could have been chosen for this audit, such as representativeness,<sup>85</sup> bilingualism,<sup>86</sup> provincial participation,<sup>87</sup> parliamentary oversight,<sup>88</sup> "merit",<sup>89</sup> or enhancing the legitimacy of the Supreme

<sup>82</sup> Peter W. Hogg, "Notes for opening remarks to Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada", February 27, 2006, reproduced in Appendix to Peter W. Hogg, "Appointment of Justice Marshall Rothstein", *supra*, note 49, at 537-38.

<sup>83</sup> "Appointment of Mr. Justice Marshall Rothstein", *supra*, note 77.

<sup>84</sup> See Moldaver & Karakatsanis Transcript (2011) [hereinafter "Moldaver & Karakatsanis Transcript"]; Wagner Transcript (2012) [hereinafter "Wagner Transcript"]; and Nadon Transcript (2013) [hereinafter "Nadon Transcript"].

<sup>85</sup> Cf. Lorne Sossin, "Should Canada Have a Representative Supreme Court?" [hereinafter "Sossin, 'Representative Supreme Court'"] in Verrelli, *supra*, note 20, 27; Sossin, "Judicial Appointment", *supra*, note 81; Indigenous Bar Association, "Respecting Legal Pluralism in Canada: Indigenous Bar Association Appeals to Harper Government to Appoint an Aboriginal Justice to the Supreme Court of Canada" in Verrelli, *supra*, note 20, 65; Indigenous Bar Association, "Indigenous Bar Association Urges Prime Minister Harper to Remove Barriers to Judicial Appointments for Indigenous Judges" in Verrelli, *id.*, 67; Sonia Lawrence, "Reflections on Judicial Diversity and Judicial Independence" in Adam Dodek & Lorne Sossin, eds., *Judicial Independence in Context* (Toronto: Irwin Law, 2010); K.D. Ewing, "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary" (2000) 38 Alta. L. Rev. 708; Richard Devlin, A. Wayne Mackay & Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38 Alta. L. Rev. 734 [hereinafter "Devlin, Mackay & Kim"]; Ian Peach, "Legitimacy on Trial: A Process for Appointing Justices to the Supreme Court of Canada", Saskatchewan Institute of Public Policy, Public Policy Paper 30 (February 2005) 9 [hereinafter "Peach"]; Isabel Grant & Lynn Smith, "Gender Representation in the Canadian Judiciary" in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) 57.

<sup>86</sup> Cf. Sébastien Grammond & Mark Power, "Should Supreme Court Judges be Required to be Bilingual?" in Verrelli, *supra*, note 20, 49; Sossin, "Representative Supreme Court", *id.*, at 43-44; Parliament of Canada, *Bilingualism of Supreme Court Judges* (Ottawa: Library of Parliament, 2011); Philip Slayton, *Mighty Judgment: How the Supreme Court of Canada Runs Your Life* (Toronto: Allen Lane, 2011), at 250-52 [hereinafter "Slayton"].

<sup>87</sup> Cf. Erin Crandall, "Intergovernmental Relations and the Supreme Court of Canada: The Changing Place of the Provinces in Judicial Selection Reform" [hereinafter "Crandall"] in Verrelli, *supra*, note 20, 71; F.C. DeCoste, "The Jurisprudence of 'Canada's Fundamental Values' and Appointment to the Supreme Court of Canada" in Verrelli, *supra*, note 20, 87 [hereinafter "DeCoste, 'The Jurisprudence'"]; and Eugénie Brouillet & Yves Tanguay, "The Legitimacy of Constitutional Arbitration in a Multinational Federative System: The Case of the Supreme Court of Canada" in Verrelli, *supra*, note 20, 126.

<sup>88</sup> See Irwin Cotler, P.C., M.P. & Charlie Feldman, "Supreme Court Appointments: When and How Should Parliament Exercise Oversight?" (March 2014) 8 J.P.P.L. 253.

<sup>89</sup> Cf. Janice Tibbetts, "Judge wants merit to be criteria for supreme job" *The Edmonton Journal* (March 4, 1999) A10; R. Foot, "Retired high court judge opposes calls for reform" *National Post* (October 28, 1999); Peach, *supra*, note 85; Hutchinson, *supra*, note 20.



Court.<sup>90</sup> Others have argued strenuously that the entire appointment process should be overhauled to make it more independent of government and provide checks and balances in the appointment process.<sup>91</sup> However, these are all normative claims regarding what the appointment process should be about. My goal in this paper is to assess the reforms based on what those who control and shape the process have claimed they are about. As set out below, the clear intention of the reforms was to enhance transparency and accountability in the appointment process and, secondarily, to increase understanding of Supreme Court justices and their work.

## 2. Federalism and the Era of Mega-Constitutional Politics, 1875–1992

When Parliament created the Supreme Court in 1875, it vested the power of appointment of Supreme Court justices with the federal Cabinet.<sup>92</sup> This decision was consistent with the prevailing political values of the time and the desire of the Fathers of Confederation to centralize power in a strong central government.

The Supreme Court was a controversial institution from the moment of its creation. It was the subject of much criticism which even involved appeals for its abolition.<sup>93</sup> The quality of appointments frequently came under attack, especially for patronage.<sup>94</sup> With abolition of appeals to the

<sup>90</sup> Cf. Peach, *id.*

<sup>91</sup> Peter Russell and Jacob Ziegel have been the most notable proponents of this view. See e.g., Peter H. Russell, "Conclusion" in Kate Malleson & Peter H. Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press) 420; Jacob S. Ziegel, "A New Era in the Selection of Supreme Court Judges?" (2006) 44 Osgoode Hall L.J. 547; Jacob S. Ziegel, "Appointments to the Supreme Court of Canada" (1994) 5 Const. Forum 10; and Ziegel, "Merit Selection", *supra*, note 28. See also F.L. Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition" in Kate Malleson & Peter H. Russell, eds., *id.*, 56.

<sup>92</sup> Strictly speaking, Supreme Court judges are appointed by the Governor in Council. See *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 4(2). The Governor in Council is the Governor General acting on the advice of the Queen's Privy Council for Canada, i.e., the federal Cabinet. See *Constitution Act, 1867*, s. 13. See generally Peter W. Hogg, *Constitutional Law of Canada*, *supra*, note 64, at § 9.4(b). The Prime Minister advises the Governor General on behalf of the Queen's Privy Council for Canada. It has become clear that the choice of all Supreme Court judges is the personal prerogative of the Prime Minister. See *supra*, note 64.

<sup>93</sup> See James G. Snell & Frederick Vaughn, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society for Canadian Legal History, 1985) 28 [hereinafter "Snell & Vaughn"].

<sup>94</sup> Snell & Vaughn, *id.*, at 82-85, 119; Ian Bushnell, *The Captive Court* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 115.

Judicial Committee of the Privy Council in 1949, the Supreme Court became truly supreme and calls to reform the appointment process by giving the provinces or the Senate some role began.<sup>95</sup> However, formal proposals to reform the appointments process began in earnest during the era of Canadian mega-constitutional politics which coincides with the ascension of Pierre Trudeau as Prime Minister in 1968.

In 1968, Prime Minister Pearson published a policy statement entitled *Federalism for the Future*.<sup>96</sup> It identified the Supreme Court as one of the central institutions of Canadian federalism and stated a willingness to discuss questions relating to the “composition, jurisdiction and procedures” of the Supreme Court at future constitutional meetings as part of any review of the Canadian Constitution.<sup>97</sup> Later that year, Pierre Trudeau became Prime Minister and issued his own policy statement, which became a blueprint for his inaugural first ministers’ conference in 1969.<sup>98</sup> Trudeau’s policy statement squarely identified “the manner of selection of the members of the Court” as an item for reform and constitutional entrenchment. According to Trudeau, “[j]udges should not be regarded as representatives of several different governments which could conceivably be allowed to appoint them.” Thus, Trudeau proposed that there be “some form of participation” by the provinces in the appointment process. Moreover, Trudeau suggested that nominations for potential appointees could be submitted to a reformed Senate for approval.<sup>99</sup>

The entrenchment of the Supreme Court in the Constitution and provincial participation in the selection of its judges thus became part of constitutional discussions and proposals from 1969 until 1992: provisions were included in the *Victoria Charter* (1971),<sup>100</sup> Bill C-60

<sup>95</sup> Snell & Vaughn, *id.*, at 194, 204; Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen’s Printer, 1969), at 44-45.

<sup>96</sup> The Rt. Honourable Lester B. Pearson, Prime Minister of Canada, *Federalism for the Future: A Statement of Policy by the Government of Canada* (1968), reproduced in Anne F. Bayefsky, *Canada’s Constitutional Act 1982 & Amendments: A Documentary History*, vol. 1 (Toronto: McGraw-Hill Ryerson Limited, 1989) 61 [hereinafter “Bayefsky”].

<sup>97</sup> *Id.*, at 68.

<sup>98</sup> See The Right Honourable Pierre Elliott Trudeau, Prime Minister of Canada, *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* (1968), reproduced in Bayefsky, *supra*, note 96, at 78.

<sup>99</sup> *Id.*, at 88-89.

<sup>100</sup> *Canadian Constitutional Charter, 1971 (The Victoria Charter)* articles 22-42, reproduced in Bayefsky, *supra*, note 96, at 215-17.

(1978),<sup>101</sup> the report of the Pepin-Robarts Commission (1979),<sup>102</sup> as well as on the agenda during most of the constitutional conferences in the 1970s.<sup>103</sup> However, during the intense constitutional negotiations of 1980-1981, the Supreme Court fell off the constitutional agenda,<sup>104</sup> except respecting the amending formula. Thus, when the Constitution was patriated and the *Constitution Act, 1982* enacted, the only mention of the Supreme Court was contained in Part V of that Act under the amending formula.<sup>105</sup>

Entrenching the Supreme Court and reforming the appointment process re-emerged on the constitutional agenda in the Meech Lake Accord (1987)<sup>106</sup> and in the Charlottetown Accord (1992).<sup>107</sup> In both cases, the proposals would have empowered the relevant provinces to submit names of nominees to the Prime Minister. The proposed reforms during this era were confined to giving the provinces a larger and formal role in the appointment process. Federalism concerns soon fell off the reform agenda for the Supreme Court as new concerns began to dominate the political discourse.<sup>108</sup>

### 3. The Democratic Deficit and Democratic Reform, 1993–2004

With the defeat of the Charlottetown Accord in the October 1992 referendum, the era of mega-constitutional politics ended. In the 1993 election that brought Jean Chrétien and the Liberals to power, the Reform Party took Ottawa by storm. Although it fell two seats short of forming

<sup>101</sup> Bill C-60, *The Constitutional Amendment Bill*, 30th Parl., 3rd Sess. (June 20, 1978), ss. 100-115, reproduced in Bayefsky, *id.*, at 387-93.

<sup>102</sup> Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Hull, QC: Minister of Supply and Services, 1979).

<sup>103</sup> See Bayefsky, *supra*, note 96, at 309-40, 437-529, 537-85.

<sup>104</sup> Tom Kent blames Trudeau for not wanting to cede any control over the appointment process. See Tom Kent, "Supreme Court Appointments: By Parliament, Not PM, and Shorter" in Verrelli, *supra*, note 20, 93, at 96 [hereinafter "Kent"]: "Trudeau's determined dedication to the Charter was joined with scant regard for most of politics and its practitioners. Willing as he was to upset many applecarts, the existing concentration of authority in the prime minister was to him the natural order of things. Amid the constitution-making turmoil of 1981 there were no voices strong enough to say him nay."

<sup>105</sup> See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 41(d), 42(d) (as discussed in *Supreme Court Reference*, *supra*, note 3).

<sup>106</sup> Peter W. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988).

<sup>107</sup> Consensus Report on the Constitution in Kenneth McRoberts & Patrick Monahan, eds., *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993).

<sup>108</sup> Some scholars have continued to raise them. See F.C. DeCoste, "The Jurisprudence", *supra*, note 87; others *supra*, note 86.

the Official Opposition party, the Reform Party with its 52 seats made a huge impact on national politics over the course of the next decade in many areas of public policy. In the area of fiscal policy, it helped galvanize support against budget deficits. In the area that might be considered “democratic policy”, Preston Manning’s Reform Party promoted populist initiatives like Senate Reform, free votes in the House of Commons, judicial elections and referendums, all aimed at the devolution of power from the Prime Minister. The Reform Party hammered away at the democratic reform agenda and succeeded in placing it on the national political agenda.

The Reform Party squarely raised Supreme Court selection as part of its democratic reform political agenda.<sup>109</sup> Throughout the 1990s, Reform Party platforms consistently took aim at judicial appointments. Reform platform “Blue Books” called generally for “more stringent and more public ratification procedures for Supreme Court justices in light of the powers our legislators are handing to the courts”.<sup>110</sup> In 1991, Reform added a call for the (reformed) Senate to ratify Supreme Court appointments.<sup>111</sup> In 1996-1997, Reform called for a more “democratic and accountable” system for all judicial appointments.<sup>112</sup> Reform advocated a role for the provinces in the appointment process<sup>113</sup> and term limits for Supreme Court justices.<sup>114</sup>

<sup>109</sup> On the critical role of the Reform party in this respect, see Crandall, *supra*, note 87, at 77-78. For criticisms of the Prime Minister’s power of appointment over Supreme Court justices during this period see Jacob S. Ziegel, “Merit Selection”, *supra*, note 28; Peter McCormick, “Could We, Should We, Reform the Senate and the Supreme Court?” (January-February 2000) Policy Options 7; Ted Morton, “Reforming the Canadian Judiciary”, Remarks prepared for the Calgary Congress, Citizens Centre for Freedom of Democracy, September 30, 2006 (on file with the author).

<sup>110</sup> Reform Party of Canada, *Principles & Policies 1990* (Calgary: Reform, 1990), at 7, online: <<http://contentdm.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2230&REC=19>>. This language is repeated verbatim in: Reform Party of Canada, *Principles & Policies The Blue Book 1995* (Calgary: Reform, 1995), at 38, online: <<http://contentdm.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2156&REC=2>> [hereinafter “Blue Book 1995”].

<sup>111</sup> Reform Party of Canada, *Principles & Policies 1991* (Calgary: Reform, 1991), at 7, online: <<http://contentdm.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2212&REC=20>>. See also *Blue Book 1995*, *id.*, at 38.

<sup>112</sup> Reform Party of Canada, *Blue Book 1996-1997 Principles & Policies of the Reform Party of Canada* (Calgary: Reform, 1996), at 28 <<http://digitalcollections.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2128&REC=7>> [hereinafter “Blue Book 1996-1997”].

<sup>113</sup> *Id.* This is also stated in Reform Party of Canada, *Blue Book Principles & Policies of the Reform Party of Canada 1999* (Calgary: Reform, 1999), at 13 <<http://contentdm.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2258&REC=18>> [hereinafter “Blue Book 1999”].

<sup>114</sup> *Blue Book 1996-1997*, *id.*, at 28; *Blue Book 1999*, *id.*, at 13. The Canadian Constitutional Foundation (“CCF”) continues to advocate for term limits for Supreme Court justices. See online:

Democratic reform became a leading political issue in the first years of the 21st century.<sup>115</sup> The democratic reform movement was supported by academic and popular writings and translated into a vast array of political party initiatives, some of which became government policy. In *The Friendly Dictatorship*,<sup>116</sup> *Globe and Mail* columnist Jeffrey Simpson captured the spirit of the Chrétien age in what has become the defining political analysis of that period. University of Moncton Professor Donald Savoie wrote academic volumes that catalogued and critiqued the centralization of power.<sup>117</sup>

The opening years of the 21st century saw the makings of a democratic reform movement. In 2001, Gordon Campbell's Liberal Party swept to power in British Columbia<sup>118</sup> promising various democratic reforms.<sup>119</sup> In New Brunswick, the government created a Commission on Legislative Democracy in December 2003 to examine and make recommendations regarding electoral, legislative and democratic reform.<sup>120</sup> In Prince Edward Island, a 2003 report recommending electoral reform was followed by another commission detailing the proposed reform and a

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<<http://termlimits.ca/>>. For reasons that I hope to describe elsewhere at another time, this is a solution in search of a problem.

<sup>115</sup> I first chronicled the democratic reform movement in Adam M. Dodek, "The Past, Present and Future of Fixed Election Dates in Canada" (2010) 4 J. of Parliamentary and Political L. 215. The following paragraphs largely reproduce material contained in pages 218-223 of that article.

<sup>116</sup> Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland & Stewart, 2002).

<sup>117</sup> See Donald J. Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2008) [hereinafter "Savoie"] and *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999). For a more recent compelling account of the democratic deficit and the need for reform, see Peter Aucoin, Mark D. Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery, 2011).

<sup>118</sup> There were two important drivers for Campbell's democratic reform agenda. First, the B.C. Liberals had never held power in modern B.C. politics. Second, in the May 1996 election, the B.C. Liberal Party had lost the provincial election by six seats despite winning the popular vote. Attorney General and Minister Responsible for Constitutional Reform Geoff Plant explained the May 1996 election as a "turning point" for democracy in British Columbia. See Geoff Plant, "The Government's View" in Gordon Gibson, ed., *Fixing Canadian Democracy* (Vancouver: The Fraser Institute, 2003) 169, at 170.

<sup>119</sup> These included fixed election dates, fixed dates for tabling of the budget, a set legislative calendar, holding open cabinet meetings to be televised and broadcast over the Internet, overhauling campaign financing laws, introducing free votes in the legislature and establishing a Citizen's Assembly on electoral reform to be followed by a province-wide referendum on proposed changes to the electoral system. See B.C. Liberal Party, *A New Era for British Columbia* (2001) 30 (on file with author).

<sup>120</sup> See Commission on Legislative Democracy (N.B.), *Final Report and Recommendations* (Fredericton: Commission on Legislative Democracy, 2004), at 4 ("How We Did Our Work") and 181-82 ("Background Appendix: Mission, Mandate, and Terms of Reference").

failed plebiscite in November 2005 rejecting reform.<sup>121</sup> In Quebec, the Estates General on the Reform of Democratic Institutions (the Beland Commission) presented a report to the Minister Responsible for Reform of Democratic Institutions in March 2003.<sup>122</sup>

In Ontario, Dalton McGuinty's opposition Liberals made democratic reform one of five key pillars of their 2003 platform,<sup>123</sup> and after winning the election that year created a Democratic Reform Secretariat and named a Minister Responsible for Democratic Renewal.<sup>124</sup> Ontario's Liberals implemented various democratic reform initiatives, most notably fixed election dates and a Citizen's Assembly on Electoral Reform culminating in a province-wide referendum on voting day in October 2007 under the province's first fixed election date.

By 2003, several leading political scientists commented on the centrality of the democratic deficit in Canadian public policy discourse: "Few would have foreseen five years ago that the very infrastructure of democracy would today be the most active area of public policy deliberation and innovation in this country."<sup>125</sup> This was the political context surrounding Paul Martin's embrace of the democratic reform agenda when he began publicly challenging Jean Chrétien for the Liberal Party leadership.<sup>126</sup> Mr. Martin's advocacy for changing the Supreme Court appointment process must be viewed through this prism.

<sup>121</sup> See Andre Barnes & James R. Robertson, *Electoral Reform Initiatives in Canadian Provinces* (Ottawa: Library of Parliament, August 18, 2009), at 7-10.

<sup>122</sup> *Id.*

<sup>123</sup> Ontario Liberal Party, *Government That Works for You: The Ontario Liberal Plan for a More Democratic Ontario* (Toronto: Ontario Liberal Party, 2003).

<sup>124</sup> The author served as Senior Policy Adviser to the Hon. Michael Bryant, Attorney General of Ontario and Minister Responsible for Aboriginal Affairs during the time that he was also the Minister Responsible for Democratic Reform (October 2003 to June 2005). In June 2005, the Hon. Marie Boutrogianni became the Minister Responsible for Democratic Reform and the Minister of Intergovernmental Relations for the duration of the Ontario Liberals' first mandate until the first fixed-date election was held in October 2007. After that election, no Minister Responsible for Democratic Reform was appointed and the Democratic Renewal Secretariat ("DRS") was organizationally abandoned. See Government of Ontario, "Browse by Organization", online: <<http://www.infogo.gov.on.ca/infogo/searchDirectory.do?actionType=searchtelephone&infoType=telephone&locale=en>>.

<sup>125</sup> Paul Howe, Richard Johnston & André Blais, "Introduction: The New Landscape of Canadian Democracy" in Paul Howe, Richard Johnston & André Blais, eds., *Strengthening Canadian Democracy* (Montreal: Institute for Research on Public Policy, 2005) 3, at 6.

<sup>126</sup> On the centrality of democratic reform for Paul Martin's policy agenda, see Susan Delacourt, *Juggernaut: Paul Martin's Campaign for Chrétien's Crown* (Toronto: McClelland & Stewart, 2003), at 258-59.

Martin put forward a package of reforms to strengthen the role of Parliament and reduce the power of the Prime Minister's Office ("PMO").<sup>127</sup> These included more free votes for MPs, increased independence for parliamentary committees, creating an independent ethics commissioner and improving the system for private members' bills. Martin proposed that Supreme Court nominations be subject to review by a parliamentary committee.<sup>128</sup> The key event was a speech Martin gave at Osgoode Hall Law School on October 21, 2002, in which he laid out a six-point plan for democratic reform in order to reduce the "democratic deficit".<sup>129</sup> The entire thrust of Martin's plan was to reduce or "check" the power of the executive and strengthen Parliament. Martin promised to change the culture of Ottawa away from "Who do you know in the PMO?"<sup>130</sup>

On the day that Paul Martin became Prime Minister in December 2003, he announced that his government would "change the way things work in Ottawa in order to re-engage Canadians in the political process" and that his government would "introduce a number of reforms to the way House of Commons affairs are conducted in order to provide Canadians with more responsive government".<sup>131</sup> The purpose of such reforms was to "restore Canadians' trust that their government is listening to them. This is best done by confirming Parliament as the centre of national debate and renewing the capacity of Parliamentarians — from all parties — to shape policy."<sup>132</sup> In a separate press release on democratic reform, the Prime Minister announced

<sup>127</sup> John Gray, *Paul Martin: The Power of Ambition* (Toronto: Key Porter Books, 2003), at 228; Susan Delacourt, *Juggernaut: Paul Martin's Campaign for Chrétien's Crown* (Toronto: McClelland & Stewart, 2003), at 258-59, 297; and Brooke Jeffrey, *Divided Loyalties: The Liberal Party of Canada, 1984-2008* (Toronto: University of Toronto Press, 2010), at 410-12.

<sup>128</sup> Paul Martin, Speech at Osgoode Hall Law School (October 21, 2002) [hereinafter "Paul Martin, Speech"]. See Campbell Clark, "Martin's plan gives back bench more clout; His proposal to transform Parliament would bolster MPs and cut PMO's power" *The Globe and Mail* (October 22, 2002), A1 [hereinafter "Clark"].

<sup>129</sup> While Martin used the term "democratic deficit" in 2002 to describe the weakened role of Parliament and parliamentarians in Canadian politics, two years earlier three scholars at Dalhousie Law School (now Schulich School of Law at Dalhousie University) described the judicial appointment process as a "democratic deficit". See Devlin, Mackay & Kim, *supra*, note 85. The authors also credit Dr. Alexandra Dobrowolsky of St. Mary's University for suggesting the title to them. For Mr. Martin's reflections on his changes to the process, see Paul Martin, *Hell or High Water: My Life In and Out of Politics* (Toronto: Douglas Gibson, 2008), at 406-407.

<sup>130</sup> Paul Martin, Speech, *supra*, note 128. See Clark, *supra*, note 128.

<sup>131</sup> Prime Minister's Office, Press Release, "A New Approach: Prime Minister Martin Announces New Government will be guided by a new approach" (December 12, 2003), online: <[http://epe.lac-bac.gc.ca/100/205/301/prime\\_minister-ef/paul\\_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=3](http://epe.lac-bac.gc.ca/100/205/301/prime_minister-ef/paul_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=3)>.

<sup>132</sup> *Id.*

that his government would “specifically consult the Standing Committee on Justice and Human Rights on how best to implement prior review of appointments of Supreme Court of Canada judges”.<sup>133</sup> Minister of Justice Irwin Cotler has written that the Prime Minister spoke to him that same day, emphasizing the importance of reforming the Supreme Court appointments process and of Parliament’s role in that reform.<sup>134</sup>

In February 2004, the Martin Government issued a “Democratic Action Plan” that was entitled *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform*.<sup>135</sup> It built on Martin’s December 2003 announcements and made them official government policy. The Democratic Action Plan called for prior parliamentary committee review of all high-level appointments made by the federal government. On Supreme Court appointments, the Democratic Action Plan was less than concrete. It committed the government to consult the relevant parliamentary committee(s) on how best to implement review of Supreme Court appointments. Importantly, Martin’s Democratic Action Plan identified three pillars: (1) “Ethics and integrity”; (2) “Restoration of the representative and deliberative role of MPs”; and (3) “Accountability”.<sup>136</sup>

As discussed in Part II, in March 2004 the Justice Committee began considering reforms to the Supreme Court appointments process. Considerations were interrupted by the federal election, which was held on June 28, 2004 and returned a Liberal minority government. The Liberal Party had included its commitment to give Parliament a role in reviewing Supreme Court appointments in its spring election platform.<sup>137</sup> Again, this was made in the context of “tackling the democratic deficit”.<sup>138</sup> In

<sup>133</sup> Prime Minister’s Office, Press Release, “Democratic Reform” (December 12, 2003), online: <[http://epe.lac-bac.gc.ca/100/205/301/prime\\_minister-ef/paul\\_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=1](http://epe.lac-bac.gc.ca/100/205/301/prime_minister-ef/paul_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=1)>.

<sup>134</sup> Cotler, “The Supreme Court Appointment Process” *supra*, note 2, at 134.

<sup>135</sup> Privy Council Office, *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform* (Ottawa: Privy Council Office, February 4 2004), online: <<http://www.pco-bcp.gc.ca/docs/information/publications/aarchives/dr-rd/docs/dr-rd-eng.pdf>>. Paul Martin’s Osgoode speech references Parliament committee review of all government appointments generally, but does not mention the Supreme Court specifically. Paul Martin, “Democratic Deficit” (2002/2003) 24:1 Policy Options 10 [text of speech].

<sup>136</sup> Privy Council Office, *id.*

<sup>137</sup> See Liberal Party of Canada, *Moving Canada Forward: The Paul Martin Plan for Getting Things Done* (Ottawa: Liberal Party of Canada, 2004), at 7.

<sup>138</sup> *Id.*

Paul Martin took office with a detailed plan to make government work better for Canadians — to make it more democratic, more ethical, more accountable. The new government has:

- Restored Parliament to the centre of national debate and decision-making by implementing broad democratic reforms to give your MP a greater voice.



August 2004, Prime Minister Martin selected Justices Abella and Charron to fill the vacancies created by the departures of Justices Arbour and Iacobucci. Minister of Justice Irwin Cotler appeared before an *ad hoc* committee of parliamentarians instead of the Justice Committee because the new post-election Parliament had not yet been summoned.

In November 2005, the Martin government fell and Stephen Harper became Prime Minister after the January 2006 election. A central issue in the campaign was the Gomery Commission and ethical government. Prime Minister Harper and his Conservative Party were elected in January 2006 with the campaign slogan "Demand Better" and promised sweeping democratic reforms. Accountability and transparency were central themes in the Speech from the Throne in 2006 and in the Prime Minister's response to it.<sup>139</sup> One of the new Government's first orders of business was to enact the *Accountability Act*.<sup>140</sup>

As described earlier, the Harper government literally picked up from where the Martin government had left off, appointing Marshall Rothstein from the shortlist submitted to Liberal Minister of Justice Irwin Cotler. The Harper government explicitly added the parliamentary hearing as a "Process designed to increase openness and accountability".<sup>141</sup> Importantly, the announcement by the Prime Minister added an additional justification for the parliamentary hearings, stating that "The Supreme Court is a vital institution that belongs to all Canadians ... the public deserves to know more about the individuals appointed to serve there, and the method by which they are appointed. ..."<sup>142</sup> These three themes: (1) openness or transparency;

- Most votes in the House of Commons are now free votes, in which MPs can represent the views of their constituents as they see fit. Since Paul Martin became Prime Minister, 72% of House votes have been free votes.
- Parliamentarians now have the authority to review most senior government appointments, including those of heads of Crown Corporations.
- The government has committed that Parliament will play a role in reviewing Supreme Court appointments.

<sup>139</sup> See Canada, Speech from the Throne to Open the First Session of the 39th Parliament of Canada, online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2006-eng.htm>>; and Prime Minister of Canada, "Turning a New Leaf: Notes for an Address by the Right Honourable Stephen Harper, Prime Minister of Canada, In Support of Measures Contained in The Speech from the Throne" (April 5, 2006), online: <<http://pm.gc.ca/eng/news/2006/04/05/prime-minister-backs-speech-throne>>.

<sup>140</sup> Bill C-2, *An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*, S.C. 2006, c. 9.

<sup>141</sup> Prime Minister of Canada, "News Release: Supreme Court Nominee to Face Questions from Parliamentarians" (February 20, 2006), online: <<http://pm.gc.ca/eng/news/2006/02/20/supreme-court-nominee-face-questions-parliamentarians>>.

<sup>142</sup> *Id.*

(2) accountability; and (3) learning about the individuals appointed to serve on the Supreme Court were repeated by Minister of Justice Toews at the parliamentary hearing for Justice Rothstein and in the announcements, appointments and parliamentary hearings in 2011, 2012 and 2013.<sup>143</sup>

#### 4. Public Perception of the Supreme Court of Canada

In the epigraph at the beginning of this paper, Irwin Cotler linked concerns about the integrity and fairness of the appointment process to the independence of the judiciary. While this linkage is correct as a matter of theory and at times and places as a matter of fact as well, it is important to acknowledge that public dissatisfaction with the Supreme Court of Canada was not a driver of reforms to the appointments process over the past decade.<sup>144</sup>

Academics who studied media coverage of the Supreme Court between 2000 and 2001 opined that “the Supreme Court has dominated the Canadian political landscape in terms of its credibility and prestige”.<sup>145</sup> While this has not been the case throughout the Supreme Court’s history, it does accurately describe the place of the Supreme Court over the last 30 years. Public opinion polls in the 1980s and 1990s consistently showed high levels of support for the Supreme Court as an institution,<sup>146</sup> especially compared to other

<sup>143</sup> See *supra*, notes 58, 61 and 62. The anomalous appointment process of Justice Cromwell in 2008 is discussed in Part II, *supra*.

<sup>144</sup> Professor Cotler identified six factors as providing the impetus for reform: (1) the impact of the Charter as transforming the legal and political landscape in Canada; (2) the centrality of the Supreme Court of Canada in this “constitutional revolution”, which elevated the profile of “unelected, unrepresentative, and unaccountable judges” allegedly usurping the democratic decision-making process; (3) “the perception of an ‘activist Court’ propagating ‘liberal values’”; (4) “the dynamic of judicial decision-making intruding upon, if not overtaking policy decisions that ought to be made by Parliament;” (5) fallout from the Gomery Commission that was extended to the judicial appointments process because it implicated Liberal-appointed Federal Court judges; and (6) “the perceived anomaly of the executive — effectively the Prime Minister — making appointments to the Supreme Court alone, without any Parliamentary input or accountability”. Cotler, “The Supreme Court Appointment Process”, *supra*, note 2, at 133. This explanation provides the immediate context for the reforms in 2004-2006.

<sup>145</sup> Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006), at 26 [hereinafter “Sauvageau, Schneiderman & Taras”].

<sup>146</sup> A Focus Canada survey of the justice system in 1989 found a high level of support for the Supreme Court. Seventy-six per cent of respondents indicated “a lot” or “some” confidence in the Supreme Court. Shirley Ouellet, *Public Attitudes towards the Legitimacy of Our Institutions and the Administration of Justice* (Ottawa: Department of Justice, Canada, Research and Development Directorate, 1991) [hereinafter “Ouellet”]; Supreme Court of Canada Microlog no. 96-00418; the same level of support is reported in Julian Roberts, *Public Confidence in Criminal Justice: A Review of Recent Trends, 2004-05: A Report for Public Safety and Emergency Preparedness Canada*

branches of government.<sup>147</sup> A 1989 poll found that a majority of Canadians had confidence in the Supreme Court to make appropriate Charter decisions.<sup>148</sup> A 1999 survey specifically investigating support of the Supreme Court revealed that of those respondents who were aware of the Supreme Court,<sup>149</sup> 76.6 per cent expressed support for the high court.<sup>150</sup>

Sauvageau, Schneiderman and Taras report that a 2001 Gallup poll indicated that the Supreme Court enjoyed the greatest respect from Canadians compared to almost all other Canadian institutions, including federal and provincial governments and the House of Commons.<sup>151</sup> Supreme Court commentators noted the high levels of public support when proposing changes to the appointment process. In a 2000 symposium on judicial appointments, Professor F.C. DeCoste stated that "[s]o far as the citizenry is concerned, our judges appear to be enjoying substantial popular support."<sup>152</sup>

Even attacks on the Supreme Court for "judicial activism" did not have a significant impact on public support for the Supreme Court as an institution.<sup>153</sup> While support for the outcomes in specific cases has been found to be somewhat linked to approval of the Supreme Court as an institution, it does not have significant impact on that widespread

(Minister of Public Safety and Emergency Preparedness, 2004), at 13, online: <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/pblc-cnfdnc-crmnl/index-eng.aspx>>.

<sup>147</sup> A different Focus Canada Poll in 1988 found that 59 per cent of respondents were "very" or "somewhat" satisfied with the federal government. Ouellet, *id.*, at 5.

<sup>148</sup> *Id.*, at 11. Ouellet does not report the exact number.

<sup>149</sup> A total of 76.3 per cent of respondents were "somewhat" or "very" aware of the Supreme Court of Canada. See Joseph Fletcher & Paul Howe, "Public Opinion and the Courts" in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2005) 255, at 265 [hereinafter "Fletcher & Howe"]. The data cited in this paragraph are from a 1999 Institute for Research on Public Policy poll which Fletcher and Howe designed in 1999. Elsewhere in the article they also use data from an unnamed 1987 "academic survey".

<sup>150</sup> Fletcher & Howe, *id.* When differentiated by region, Quebec scored the lowest on both of these points: only 42 per cent awareness and 69.8 per cent satisfaction. Fletcher & Howe, *id.*, at 265. The data cited in this paragraph are from a 1999 Institute for Research on Public Policy poll which Fletcher and Howe designed in 1999. Elsewhere in the article they also use data from an unnamed 1987 "academic survey".

<sup>151</sup> Sauvageau, Schneiderman & Taras, *supra*, note 145, at 26-27, citing Josephine Mazzuca, "Armed forces, Supreme Court and public schools top institutional list for respect and confidence" (May 28, 2001) 61 Gallup Poll 30.

<sup>152</sup> F.C. DeCoste, "Introduction" (2000) 38 Alta. L. Rev. 60, at 608. He cited polls from 1999 that showed that 62 per cent of Canadians supported judicial over parliamentary supremacy and that 77 per cent of Canadians were favourably disposed to the Supreme Court of Canada. Janice Tibbetts, "Judges should have final say, poll suggests" *The Edmonton Journal* (April 14, 1999) A3 [hereinafter "Tibbetts, 'Judges should have final say'"], cited in F.C. DeCoste, *id.*, at 608.

<sup>153</sup> Fletcher & Howe, *supra*, note 149.

support.<sup>154</sup> Similarly, while political views influence opinions about specific Supreme Court decisions and may indirectly reduce support for the Supreme Court,<sup>155</sup> a high level of support for the Court persists, even among people who disagree with the outcome of high-profile cases.<sup>156</sup>

Public support for the Supreme Court remained high into the 2000s. Ipsos-Reid data from the early years of the decade found that 70 per cent of respondents approved of the Supreme Court's actions "over the past year or so".<sup>157</sup> Interestingly, despite this strong approval, the same poll found that only 10 per cent of Canadians believed that the Supreme Court was completely free of any political influence, while 84 per cent thought the Court's decisions were influenced by partisan politics "to some degree".<sup>158</sup> A 2010 Environics poll also found high support for the Supreme Court. The poll found that the Supreme Court (together with the military and the justice system) enjoyed ongoing, relatively high levels of confidence. The Supreme Court had a 69 per cent confidence level, down three per cent from the Environics 2007 poll. In contrast, Parliament and political parties enjoyed lower levels of confidence and were declining faster: Parliament enjoyed 42 per cent confidence, down

<sup>154</sup> Lori Hausegger & Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada" (2004) 37:1 Can. J. Poli. Sci. 23, at 24-25. Their exact phrasing in their conclusion is that they found "some support" for this hypothesis. Fletcher & Howe, *id.*, at 281.

<sup>155</sup> Fletcher & Howe, *id.*, at 229.

<sup>156</sup> Fletcher & Howe, *id.* Among people who disagreed with the outcome of all three cases (a total 10 per cent of respondents), 58 per cent of them agreed that the Supreme Court, not Parliament, should have the last word on constitutional review. *Id.*, at 284.

<sup>157</sup> Darrell Bricker & John Wright, *What Canadians Think About Almost Everything* (Toronto: Doubleday Canada, 2005), at 14. The book does not mention the exact year the data was recorded, only that this time period "includes the controversial Robert Latimer appeal", and therefore it must be 2002; or possibly 2001 as *Latimer* was decided by the Supreme Court in 2001. See *R. v. Latimer*, [2001] S.C.J. No. 1, 2001 SCC 1, [2001] 1 S.C.R. 3 (S.C.C.). Thanks to Emily Alderson for this deduction and for her excellent research in this section generally. Contrary to Fletcher and Howe's findings, support for the Supreme Court's actions was *highest* in Quebec (77 per cent). Paradoxically, Quebec is also ranked the province the "most likely to oppose an SCC decision". *Id.*, at 15. Support for the Supreme Court's actions was lowest in Saskatchewan and Manitoba (62 per cent), although this may be due to the recently concluded case of Robert Latimer, a Saskatchewan resident. Fully 59 per cent of Canadians disagreed with the Supreme Court's decision to uphold his sentence. Although Bricker and Wright do not hypothesize on reasons for Supreme Court support, this may be another instance where specific support has some mild impact on diffuse support. Bricker and Wright break down Supreme Court approval by demographics: approval increases with education (78 per cent among university graduates and 59 per cent among those with a high school education), and with income (74 per cent among those earning above \$30,000 annually and 65 per cent among those earning less). *Id.*, at 15.

<sup>158</sup> *Id.*

13 per cent from 2007, and political parties were once again the least confidence-inspiring at 19 per cent, down 13 per cent.<sup>159</sup>

Conversely, polls show a high level of dissatisfaction with the appointment process for Supreme Court judges and even a desire for judges to be elected.<sup>160</sup> Thus, public opinion polls reveal what might be considered a paradox: a high level of public support for the Supreme Court but a desire for change in the appointment process.<sup>161</sup> This may represent inconsistent public opinion, which is not unusual, or it might reflect public sophistication in terms of dissatisfaction with the process of appointment rather than with the results.

Reforms to the appointments process were not a response to any perception that the persons appointed had been problematic in some way.<sup>162</sup> Reflecting on his experience as Minister of Justice, Irwin Cotler wrote that the Supreme Court of Canada "is respected across the country and around the world as a model of what a vital, modern, and independent judicial institution should be".<sup>163</sup> According to the Minister of Justice who began the reform process, the existing process had produced excellent appointees.<sup>164</sup> While it is easy to dismiss such statements as political rhetoric, the thrust of the political discourse over the past 25 years has been about empowering Parliament and reining in the Prime Minister, not changing the Supreme Court.

Thus, when Minister Cotler appeared at the Ad Hoc Committee on Supreme Court of Canada Appointments in August 2004 after the appointment of Justices Abella and Charron, he commented that the appointments process "has been critiqued not with regard to the quality of appointments, but with respect to the lack of transparency and Parliamentary input. And, yes, there has been a lack of transparency, an absence of Parliamentary input, and very little by way of public

<sup>159</sup> Environics, *Focus Canada* (2010), at 19, online: <[http://www.queensu.ca/cora/\\_files/fc2010report.pdf](http://www.queensu.ca/cora/_files/fc2010report.pdf)>.

<sup>160</sup> Sauvageau, Schneiderman & Taras, *supra*, note 145, citing Chris Cobb, "Canadians want to elect court" *National Post* (February 4, 2002) A1.

<sup>161</sup> See Tibbetts, "Judges should have final say", *supra*, note 152 (noting that only 8 per cent of Canadians support the way in which judges are appointed).

<sup>162</sup> See Alarie & Green, "Policy Preference", *supra*, note 43, at para. 2: "the evidence shows that the judicial appointments process to the Supreme Court has been satisfactory"; Rory Leishman, "No Need for Radical Reform of the Federal Judicial Appointment Process" (2007) 58 U.N.B.L.J. 112, at 120; Cotler, "The Supreme Court Appointment Process", *supra*, note 2.

<sup>163</sup> Cotler, "The Supreme Court Appointment Process", *id.*, at 132.

<sup>164</sup> *Id.*

involvement.” According to then-Minister Cotler, that is what his government was “seeking to reform and rectify”.<sup>165</sup>

#### IV. AUDIT

This section analyzes the reforms between 2004 and 2013 in terms of (1) transparency; (2) accountability; and (3) the promotion of public knowledge about the work of the Supreme Court of Canada and its judges. The first two factors are linked because transparency is not an end in itself; it is a necessary pre-condition for ensuring accountability.<sup>166</sup> Transparency relates to the openness of the process whereas accountability involves explanation for actions or decisions.

Accountability is an important feature of responsible government under the Canadian Constitution.<sup>167</sup> Individual ministers “are accountable to Parliament for the exercise of the powers, duties and functions vested in them by statute or otherwise”.<sup>168</sup> Under our parliamentary system of government, accountability “derives directly from the responsibility of ministers”.<sup>169</sup> The Ministry is collectively accountable for all the policies and actions of the government; ministers “must be prepared to explain and defend the Government’s policies before Parliament at all times”.<sup>170</sup> This is accountability in the constitutional sense, but accountability may be understood in a broader sense as “a means of making responsible the exercise of power”.<sup>171</sup> In her testimony before the Gomery Commission,

<sup>165</sup> Department of Justice, Speeches, Speaking Notes for Irwin Cotler, Minister of Justice and Attorney General of Canada on the Occasion of a Presentation to the Ad Hoc Committee on Supreme Court Appointments” (August 25, 2004), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116083626/http://www.canada.justice.gc.ca/en/news/sp/2004/doc\\_31212.html](http://www.collectionscanada.gc.ca/webarchives/20071116083626/http://www.canada.justice.gc.ca/en/news/sp/2004/doc_31212.html)> [hereinafter “Speaking Notes”].

<sup>166</sup> For example, Dean Sossin has asserted that “[a]n accountability culture suggests a focus both on transparent criteria for selection and justification to ensure that the criteria were appropriately applied.” Sossin, “Judicial Appointment”, *supra*, note 81, at 39.

<sup>167</sup> See Canada, Privy Council Office, *Responsibility in the Constitution*, “Constitutional Responsibility and Accountability”, online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=constitution/table-eng.htm>> Part VII [hereinafter “*Responsibility in the Constitution*”].

<sup>168</sup> Canada, Privy Council Office, *Accountable Government: A Guide for Ministers and Ministers of State* (2011), at 2 [hereinafter “*Accountable Government*”].

<sup>169</sup> *Responsibility in the Constitution*, *supra*, note 167, “The Principles of Accountability”, at Part VIII.

<sup>170</sup> *Accountable Government*, *supra*, note 168, at iv.

<sup>171</sup> *Responsibility in the Constitution*, *supra*, note 167, at Part VIII. On accountability generally, see Mark Bovens, Robert E. Goodin & Thomas Schillemans, eds., *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014).

Jocelyn Bourgon, Canada's former top civil servant, explained that "where authority resides, so resides accountability, and if one has authority to strike a decision, then one has an obligation to provide an account".<sup>172</sup>

Transparency is but one means of making responsible the exercise of power. Thus, in auditing accountability, we will seek to evaluate the extent to which the process makes those responsible for the exercise of power through the appointment process explain or account for such decisions.

### 1. Transparency

In terms of transparency, we seek to evaluate the availability of information about the operation of the appointment process. We seek to understand factors including the following: (1) how the process works; (2) the criteria for selection; (3) who is consulted; (4) the role of the public; (5) how the Minister of Justice prepares the so-called "long list", and how many names are on it; (6) what the Selection Panel does; and (7) who makes the ultimate decision. When these questions are considered, the inevitable conclusion is that we know much less about the process in 2014 than we did a decade ago when Justices Abella and Charron were appointed to the Court. The continuing controversy surrounding the appointment of Justice Nadon in 2013-2014 has demonstrated just how opaque the appointment process has become.

#### (a) *How Does the Process Work?*

Since the reforms were initiated in 2004, no government has published comprehensive guidelines on how the selection process works. Since the Rothstein appointment, the transparency of the appointment process has been significantly reduced. The only information known about the process is what the Prime Minister has announced in successive press releases:

- To identify a pool of qualified candidates for appointment to the Supreme Court of Canada, the Minister of Justice and Attorney General will consult with the Ontario Attorney General, as well as leading members of the legal community. Members of the public are invited

<sup>172</sup> Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities (The Hon. John Gomery, Commissioner) (Ottawa), vol. 47, December 8, 2004, at 8235, quoted in Savoie, *supra*, note 117, at 257.

to submit their input with respect to qualified candidates who merit consideration at [www.justice.gc.ca/eng/scc-csc.html](http://www.justice.gc.ca/eng/scc-csc.html).

- The list of qualified candidates will be reviewed by a selection panel composed of five Members of Parliament — including three Members from the Government Caucus and one Member from each of the recognized Opposition Caucuses, as selected by their respective leaders — to review the list of qualified candidates.
- The Supreme Court Selection Panel will be responsible to assess the candidates and provide an unranked short list of six qualified candidates to the Prime Minister of Canada and the Minister of Justice for their consideration.
- The two selected nominees will appear at a public hearing of an *ad hoc* parliamentary committee to answer questions of Members of Parliament. This is a process that was first established for the appointment of the Honourable Mr. Justice Marshall E. Rothstein in 2006.<sup>173</sup>

This limited information about the operation of the process is deficient, as will become apparent in the successive sections.

*(b) What Are the Criteria for Selection?*

There has been a decrease in transparency in terms of publication of the criteria for selection since the reforms began in 2004. Under the tenure of Minister of Justice Cotler, such criteria were clearly articulated as: professional capacity;<sup>174</sup> personal characteristics;<sup>175</sup> and diversity on the

<sup>173</sup> Prime Minister of Canada, "Upcoming Retirement", *supra*, note 58. See also Prime Minister of Canada, "Marie Deschamps", *supra*, note 61; and Prime Minister of Canada, "Justice Morris Fish", *supra*, note 62.

<sup>174</sup> Professional capacity included: (1) "the highest level of proficiency in the law, superior intellectual ability and analytical and written skills;" (2) "proven ability to listen and to maintain an open mind while hearing all sides of an argument;" (3) "decisiveness and soundness of judgement;" (4) "capacity to manage and share consistently heavy workload in a collaborative context;" (5) "capacity to manage stress and the pressures of the isolation of the judicial role;" (6) "strong cooperative interpersonal skills;" (7) "awareness of social context;" (8) "bilingual capacity;" and (9) "specific expertise required for the Supreme Court." Speaking Notes, *supra*, note 165.

<sup>175</sup> Personal characteristics included: (1) highest level of personal and professional ethics: "honesty; integrity; candour;" (2) "respect and consideration for others: patience; courtesy; tact; humility; fairness; tolerance;" and (3) "personal sense of responsibility: common sense; punctuality; reliability." *Id.*



Court.<sup>176</sup> Since 2006, the criteria for evaluating candidates for appointment are no longer published by the government.

In each of the appointments in each of 2006, 2011, 2012 and 2013, Peter Hogg or Jean-Louis Baudouin identified qualities that they believed Supreme Court justices should have.<sup>177</sup> The list of qualities differed as between Professors Hogg and Baudouin, which is problematic in and of itself. Moreover, there is no indication that the qualities identified by Professors Hogg and Baudouin were used by the Minister of Justice in creating the long list, by the Selection Panel in creating the short list of candidates, or by the Minister of Justice and the Prime Minister in selecting the nominee. Additionally, the articulation of the qualifications shows the important link between transparency and accountability. If the parliamentary hearings are supposed to serve an accountability function, it becomes difficult for MPs to fulfil this function if the criteria for selecting candidates — which should then become the criteria for evaluating the nominee — are unknown or articulated only at the beginning of the parliamentary hearing.

*(c) Who Is Consulted and What Is the Nature of those Consultations?*

We do now know the people who are consulted for their opinions about potential candidates for appointment. In 2004, Minister of Justice Cotler explained that he consulted with the following individuals:

- the Chief Justice of Canada, Beverley McLachlin;
- the Attorney General of Ontario, Michael Bryant;
- the Chief Justice of Ontario, Roy McMurtry;
- the Treasurer of the Law Society of Upper Canada, Frank Marrocco;
- the President of the Canadian Bar Association, William Johnson; and
- the President of the Ontario Bar Association, Jonathan Spiegel.<sup>178</sup>

<sup>176</sup> *Id.* As discussed in Part III, there is no indication that the criteria were actually used by Minister Cotler or by subsequent selection panels.

<sup>177</sup> See Rothstein Transcript (2006) [hereinafter "Rothstein Transcript"]; Moldaver & Karakatsanis Transcript; Wagner Transcript; and Nadon Transcript, *supra*, note 84. See also Hogg, "Appointment of Justice Marshall Rothstein", *supra*, note 49, at 538.

<sup>178</sup> Speaking Notes, *supra*, note 165. In his appearance before the Justice Committee in March 2004, Cotler explained that he would consult with the following individuals:

Similar explanations have been provided by successive Ministers of Justice in each of the appointments since 2004.<sup>179</sup>

To say that certain people were consulted in making a decision does not reveal the quality of those consultations.<sup>180</sup> Tom Kent has asked: "How wide are the consultations that precede the decision, what considerations are weighed, what alternatives considered ...?"<sup>181</sup> In the absence of published criteria for appointment and consultation guidelines,<sup>182</sup> we do not know the answers.

There are consultations and then there are consultations. A consultation may be a *pro forma* affair wherein the person being consulted is asked for suggestions which are then politely filed away. Such appears to have been the case with the federal government's consultation with the Attorney General of Quebec over the Nadon appointment.<sup>183</sup> Consultations may also be a true dialogue: a discussion and an exchange of ideas. Such was clearly the case in the summer of 2004 in the case of discussions between Minister of Justice and Attorney General of Canada Irwin Cotler and the Ontario Attorney General over the two pending appointments to the Supreme Court from Ontario.<sup>184</sup>

- the Chief Justice of Canada and perhaps other members of the Supreme Court of Canada;
- the Chief Justices of the courts of the relevant region;
- the Attorneys General of the relevant region;
- at least one senior member of the Canadian Bar Association;
- at least one senior member of the Law Society of the relevant region.

<sup>179</sup> See Rothstein Transcript, *supra*, note 177; Karakatsanis & Moldaver Transcript; Wagner Transcript; and Nadon Transcript, *supra*, note 84.

<sup>180</sup> For an especially biting commentary on the nature of consultations, see the commentary by University of Toronto law professor Douglas Sanderson, "Welcome to My World – Consultation and Canada Post", *Ultra Vires* (January 29, 2014), online: <<http://ultravires.ca/2014/01/welcome-to-my-world-consultation-and-canada-post/>>.

<sup>181</sup> Kent, *supra*, note 104, at 96.

<sup>182</sup> See, e.g., Ontario, Ministry of Aboriginal Affairs, *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights* (June 2006), online: <<http://docs.files.ontario.ca/documents/258/3-maa-draft-guidelines-for-ministries-on.pdf>>.

<sup>183</sup> See Paul Jourmet, "Le Québec lésé par le retrait du juge Nadon, dénonce Cloutier" *La Presse* (October 9, 2013), quoted in Irwin Cotler, P.C., M.P. & Charlie Feldman, "Supreme Court Appointments: When and How Should Parliament Exercise Oversight?" (March 2014) 8 J.P.P.L. 253, at 277.

<sup>184</sup> As Carissima Mathen notes, in his appearance before the *ad hoc* committee in August 2004, Minister Cotler noted that he spoke to some people, including Ontario Attorney General Michael Bryant, several times about various candidates. See Mathen, "Choices and Controversy", *supra*, note 14, at 57, note 26. In 2004, I was serving as Senior Policy Adviser to the Attorney General of Ontario Michael Bryant, and although I did not participate in any discussions between the two Attorneys General, I can certainly attest that such discussions took place, on more than one occasion, and from my perspective they appeared to be real, substantive discussions of the merits of various candidates for the country's highest court.

On the nature or the quality of the consultations, we also know less in 2014 than we did in 2004. In 2004, Minister of Justice Irwin Cotler explained the consultations that he had undertaken thusly:

In order to assess the candidates, I met with each of the people I mentioned earlier. Indeed, I consulted them several times so as to verify information which I had received and to assess whether a point of view expressed by one person was shared by the others. Potential candidates may have been identified later on in the process, at which point I would again go back and seek the views of people I had previously spoken to. I point this out to suggest that the consultations were not a one-shot exchange where I spoke to each person once and that's it. Rather, there was an ongoing and overlapping dialogue between me and the other consultees.

In assessing the candidates, I asked questions that were related to the criteria mentioned earlier.

Again, I cannot stress enough that the main focus was merit. Although my discussions were confidential, I can tell you that some of the consultees were particularly well-placed to provide certain types of input — for example, the Chief Justice of Canada on the expertise required for the Court; the Chief Justice of Ontario on issues such as collegiality and ability to handle a heavy workload; and the Attorney General of Ontario; the Law Society; and the CBA on the candidate's reputation in the legal community.<sup>185</sup>

Minister Cotler explained that he had personally read the opinions and writings of the candidates.<sup>186</sup>

*(d) What Role Does the Public Play?*

Several Ministers of Justice writing after the fact have claimed that members of the public were always free to provide their views of prospective candidates to the Minister.<sup>187</sup> In 2005, when Justice Major announced his retirement from the bench, Minister of Justice Irwin Cotler invited public

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<sup>185</sup> Speeches, Speaking Notes, *supra*, note 165.

<sup>186</sup> *Id.* This is perhaps not surprising given that Minister Cotler was a law professor with a reputation for reading broadly.

<sup>187</sup> See The Honourable Anne A. McLellan, P.C., "The 'New' Selection Process", 31:3 *Law Matters* (June 2006) 4; and Cotler, "The Supreme Court Appointment Process", *supra*, note 2, at 137.

input<sup>188</sup> and also took the unprecedented step of running advertisements in daily newspapers in the Western provinces (Manitoba, Saskatchewan and Alberta) from where Justice Major's replacement was likely to come.<sup>189</sup> The advertisements invited written representations from "any person or group, to propose candidates for appointment to the Supreme Court".<sup>190</sup> It is not known whether the Minister received any submissions from members of the public or what the contents of any such submissions were.

Beginning with the 2011 vacancies, the Minister of Justice explicitly sought public input in the process. When Justices Binnie and Charron announced their retirement in May 2011, the Prime Minister issued a statement setting out the process which included the following element:

To identify a pool of qualified candidates for appointment to the Supreme Court of Canada, the Minister of Justice and Attorney General will consult with the Ontario Attorney General, as well as leading members of the legal community. Members of the public are invited to submit their input with respect to qualified candidates who merit consideration at [www.justice.gc.ca/eng/scc-csc.html](http://www.justice.gc.ca/eng/scc-csc.html).<sup>191</sup>

When Justices Karakatsanis and Moldaver appeared before the committee of parliamentarians in October 2011, the Minister of Justice asserted that "Members of the public were also included in this process and were provided the opportunity to submit input with respect to qualified candidates who would merit consideration."<sup>192</sup>

I remain deeply skeptical about the public input element for several reasons. First, the public outreach is limited and generally passive; it is very Web 1.0. Members of the public are invited to e-mail their views to a Justice Canada e-mail account. There is no outreach or public consultation with members of the public who might be knowledgeable about prospective candidates: lawyers and lawyers' organizations.<sup>193</sup> Second, members of the public are generally not familiar with Supreme Court nominees and

<sup>188</sup> Canada, Department of Justice, News Release, "Justice Minister Invites Public Input Concerning Supreme Court of Canada Vacancy" (August 30, 2005), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116084213/http://www.canada.justice.gc.ca/en/news/nr/2005/doc\\_31614.html](http://www.collectionscanada.gc.ca/webarchives/20071116084213/http://www.canada.justice.gc.ca/en/news/nr/2005/doc_31614.html)>.

<sup>189</sup> See, e.g., *Winnipeg Free Press* (August 31, 2005) A6.

<sup>190</sup> *Id.*

<sup>191</sup> Prime Minister of Canada, "Upcoming Retirement", *supra*, note 58.

<sup>192</sup> Nadon Transcript, *supra*, note 84. Almost identical language was used by Minister of Justice Nicholson at Justice Wagner's hearing in 2012 and at Justice Moldaver's and Justice Karakatsanis' hearing in 2011. See Wagner Transcript, *supra*, note 84; Moldaver and Karakatsanis Transcript, *id.*

<sup>193</sup> Ministers of justice have claimed that they have consulted with heads of selected legal organizations, but this cannot be considered broad-based consultation with members of the legal community, let alone "public consultation".

the Minister of Justice is unlikely to get much substantive input that would actually be useful.<sup>194</sup> Third, it is not clear that the Minister of Justice does anything with the public input, let alone passes it along for consideration to the Supreme Court Selection Panel for its consideration or to the parliamentary committee. There is no public summary provided of the public input. It thus appears to me that the sole reason for the invitation to members of the public is to enable the Minister of Justice to claim that members of the public participated in the process.

*(e) How Does the Minister of Justice Prepare the So-Called "Long List" and How Many Names Are on the "Long List"?*

The amount of disclosure of the process has differed across time. The most disclosure occurred with the appointment of Justice Rothstein and it has decreased over time.

Thus, at the beginning of the process that led to the appointment of Justice Rothstein, Minister of Justice Cotler stated that he would submit a

<sup>194</sup> To test my assumption, I made an access request for 2011 requesting the following:

1. Number of e-mails received by Department of Justice in connection with May 13, 2011 announcement from the Prime Minister soliciting input into nomination process for Supreme Court of Canada judges to send e-mails to SCC\_Selection\_Process@justice.gc.ca; 2. Copies of contents of all e-mails received by [this e-mail address] between May 13, 2011 and September 30, 2011; and 3. Copies of all memoranda, analysis, documents, etc. in connection with any public input into the Supreme Court of Canada appointment process May 1st to September 30, 2011.

I received 81 pages of correspondence in response to my request. No records were withheld (names were blocked out under s. 19(1) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (personal information)). There were no memoranda, analysis or briefing notes in connection with the correspondence, which leads me to believe that nothing was done with it. There was no indication that the public input was fed into the decision-making process in any way. Of the 81 pages, most of letters or e-mails consisted of members of the public generally dissatisfied with the legal system in some way. These 81 pages included routing slips, draft responses and responses from the Minister of Justice. All told, there were only 18 public responses. Only several are notable. The bâtonnier of the Barreau du Québec wrote to the Prime Minister on June 21, 2011 advocating the importance of candidates' ability to hear cases in both official languages without the aide of an interpreter: Letter from the Barreau du Québec to Prime Minister Stephen Harper, dated June 21, 2011 (on file with author). One e-mailer stated that "...the Chief and Rosalie [Abella] must go. Send them on international mission to spread democracy in third world country." E-mail to the Hon. Rob Nicholson, dated June 22, 2011 (on file with author). Only one member of the public actually recommended candidates from Ontario (one other recommended a judge from New Brunswick). A thoughtful lawyer who claimed to be "a current practitioner in, and follower, of the [Supreme] Court" recommended two members of the Ontario Court of Appeal and gave a paragraph explanation for each judge as to why they would be good Supreme Court judges. See E-mail to the Honourable Robert Nicholson, Minister of Justice and Attorney General of Canada, dated May 17, 2011 (on file with author).

list of five to eight names to the Advisory Committee.<sup>195</sup> At Justice Rothstein's hearing, Minister of Justice Toews explained that his predecessor Irwin Cotler had submitted a list of six candidates to the advisory committee to produce an unranked shortlist of three.<sup>196</sup> In none of the subsequent appointments has the Minister of Justice disclosed how many names he provided to the Supreme Court Selection Panel.

(f) *What Does the Selection Panel Do and How Does it Work?*

Some information about the work of the Supreme Court Selection Panel is available through the Office of the Commissioner for Federal Judicial Affairs ("FJA") which supports the work of the Selection Panel. Thus, the FJA website explains that in July 2013, the Selection Panel "was provided with examples of decisions written by each of the candidates put forward to replace the Honourable Morris J. Fish at the Supreme Court of Canada".<sup>197</sup> The FJA further explains:

Each candidate was asked to identify 5 decisions for particular consideration by the Panel, preferably dealing with issues coming within the usual scope of the Supreme Court of Canada. These decisions were to address issues requiring a consideration of principles and policy in novel contexts rather than decisions where the dispute is primarily factual. As far as possible, the choice of the 5 decisions was to reflect at least one of each of the following areas of law: Constitutional law (*Charter* or Federalism); Criminal law (or national security); Civil law; Administrative law; and the Candidate's choice.<sup>198</sup>

The website then provided the names, citations and links to the five decisions that Justice Nadon had provided to the Selection Panel.<sup>199</sup> Similar information was available for the appointments in 2011 and 2012.

<sup>195</sup> See Cotler, "The Supreme Court Appointment Process", *supra*, note 2, at 144-45.

<sup>196</sup> Rothstein Transcript, *supra*, note 177.

<sup>197</sup> Office of the Commissioner for Federal Judicial Affairs, Supreme Court Nomination, Examples of Decisions, Note [hereinafter "Examples of Decisions"] (available on request from the Office of the Commissioner for Federal Judicial Affairs and on file with author). In a 2014 article, former Minister of Justice Irwin Cotler provides the table of contents for a "binder" that MPs on the Nadon Supreme Court Selection Panel reportedly received. See Cotler & Feldman, *supra*, note 36, at 275.

<sup>198</sup> Examples of Decisions, *id.*

<sup>199</sup> *Id.* Those decisions were *Martin v. Canada (Attorney General)*, [2013] F.C.J. No. 51, 2013 FCA 15 (F.C.A.), leave to appeal refused [2013] S.C.C.A. No. 122 (S.C.C.); *Siemens Canada Ltd. v. J.D. Irving Ltd.*, [2012] F.C.J. No. 1120, 2012 FCA 225 (F.C.A.); *Canada (Attorney General) v. Jodhan*, [2012] F.C.J. No. 614, 2012 FCA 161 (F.C.A.); *Mercier v. Canada (Correctional Service)*, [2010] F.C.J. No. 816, [2012] 1 F.C.R. 72, 2010 FCA 167 (F.C.A.), leave to appeal refused

It has not been made clear on what basis the selection panels conduct their work. It is not clear whether they work by consensus or majority vote.

For the nomination of Justices Karakatsanis and Moldaver in 2011, Minister of Justice Nicholson stated that “[t]he list of six candidates, which included the two nominees, was unanimously approved by the panel”.<sup>200</sup> Similar language was used by the Minister of Justice for the nomination of Justice Wagner in 2012,<sup>201</sup> but was absent in the nomination of Justice Rothstein in 2006 and Justice Nadon in 2013.<sup>202</sup> Subsequent comments by one member of the selection committee for Justice Nadon’s appointment assert that confidentiality prohibits members of the panel from even disclosing how it operates.<sup>203</sup> The government has simply not made clear the basis upon which the shortlist is reached.

(g) *Who Makes the Ultimate Decision?*

Where once it was unclear who actually makes the final decision for appointment, it is now clear that the decision is the Prime Minister’s, advised by the Minister of Justice. While some scholars have asserted that puisne judges are appointed on the recommendation of the Minister of Justice and the appointment of the Chief Justice is the Prime Minister’s prerogative,<sup>204</sup> subsequent Ministers of Justice have clearly indicated that the selection of all justices of the Supreme Court is the choice of the Prime Minister.<sup>205</sup>

[2010] S.C.C.A. No. 331 (S.C.C.); and *Khadr v. Canada (Prime Minister)*, [2009] F.C.J. No. 893, [2010] 1 F.C.R. 73, 2009 FCA 246 (F.C.A.).

<sup>200</sup> Moldaver & Karakatsanis Transcript, *supra*, note 84.

<sup>201</sup> Wagner Transcript, *id.*: “A list of three candidates, which included our nominee, were unanimously approved by the panel.”

<sup>202</sup> Nadon Transcript, *id.*: “the selection panel completed their report and submitted this unranked list that I referred to of three qualified candidates, which of course included our nominee, Marc Nadon.”

<sup>203</sup> NDP MP Françoise Boivin, who was a member of the Supreme Court Selection Panel, stated that confidentiality prohibited her from even disclosing how the panel operated. See Twitter, @FBoivinNPD, online: <<https://twitter.com/FBoivinNPD/status/396800646881370113>>: “You dont sign off. It could be unanimous, it could be majority. Cant tell coz of confidentiality!”

<sup>204</sup> See Devlin, Mackay & Kim, *supra*, note 85, at 763, citing S.I. Bushnell, “The Appointment of Judges to the Supreme Court of Canada: Past, Present and Future” in *Judicial Selection in Canada: Discussion Papers and Reports* (Canadian Association of Law Teachers Special Committee on the Appointment of Judges, 1987), at 1.

<sup>205</sup> See McLellan, “Foreword”, *supra*, note 64, at 604; and Cotler, “The Supreme Court Appointment Process”, *supra*, note 2. See Rothstein Transcript, *supra*, note 177; Karakatsanis & Moldaver Transcript, *supra*, note 84; Wagner Transcript, *supra*, note 84; and Nadon Transcript, *supra*, note 84. See also Tonda MacCharles, “Supreme Court pick defends qualifications”, *supra*, note 64 (stating that Justice Minister Peter MacKay noted that the selection of Supreme Court justices was the decision of the Prime Minister).

At each of the four committee hearings, the Minister of Justice explicitly stated that the "Governor in Council will act on the advice of the Prime Minister".<sup>206</sup> At the Rothstein hearing, Justice Minister Toews explained that the committee was charged "with providing advice to the Prime Minister. He has undertaken to take into account the deliberations and views of the committee in deciding whether or not to proceed with the appointment of Justice Rothstein." In 2006, it was reported that the Prime Minister watched the hearings on television. It is unknown whether he watched the subsequent hearings.<sup>207</sup>

*(h) Conclusion: A Transparency Deficit*

The reformed Supreme Court appointment process provides many opportunities for disclosure: prior to a vacancy being announced; when a vacancy is announced; when the nominee is announced; during the public hearing; and at the moment of formal appointment by the Prime Minister. Despite frequent and repeated claims by successive governments about the openness and transparency in the process, we have seen that more is unknown about the process than is known. I am not alone in concluding that the process is wanting in transparency.<sup>208</sup> Writing years after the Rothstein hearing but before the 2011 appointments, Supreme Court observer Philip Slayton concluded that "the private nature of the current practice leads to public suspicion and skepticism".<sup>209</sup> I am not sure that substantial change has occurred since Slayton wrote those words that would lead him to change his assessment. My audit of the reforms since 2004 leads me to conclude that they have not fostered significant change in transparency: there is still a serious transparency deficit in the Supreme Court appointment process. As discussed in the next section, the public hearings have failed to address this transparency deficit.

<sup>206</sup> Rothstein Transcript, *supra*, note 177.

<sup>207</sup> In 2013, the Prime Minister departed for Indonesia the day after the Nadon hearing. See Prime Minister of Canada, Media Advisories, "Public event for Prime Minister Stephen Harper for Thursday, October 3rd", October 2, 2013, online: <<http://www.pm.gc.ca/eng/news/2013/10/02/public-event-october-3-2013>>.

<sup>208</sup> See, e.g., DeCoste, "The Jurisprudence" *supra*, note 87, at 87: "both the process and the substance of appointment offend in disgracefully equal measure the principles of transparent government"; Kent, *supra*, note 104, at 96.

<sup>209</sup> Slayton, *supra*, note 86, at 246.



## 2. Accountability

One of the articulated purposes of the reforms was to increase the role of MPs and reduce the unfettered discretion of the Prime Minister in the selection process. Based on these criteria, the reforms to the selection process have not achieved their stated objectives.

### (a) *Fettering of Discretion*

The process that has developed allows the executive to preserve its control over the selection process while maintaining that it has increased transparency and accountability.<sup>210</sup> The government is able to control both the input and the output of the selection process, thereby severely constraining the opportunities for any external actors to influence the decision-making process.

The executive is able to wholly control the inputs. It provides the selection panel with a closed list of candidates. The Selection Panel is not permitted to consider candidates outside this list. The discretion of the Selection Panel is further circumscribed by the length of the list which it is assigned to consider. The list of candidates that the government provides to the Selection Panel has been mislabelled as a "long list", giving the false impression that there are a large number of names on this list. However, the so-called long list does not appear to be significantly longer than the short list. Since 2006, the government has refused to disclose how many candidates are on this list. In 2006, it did disclose that there were six candidates on the "long list". In the case of the two appointments in 2011, it was reported that there were 12 or 13 persons under consideration.<sup>211</sup> By controlling the input in this fashion, the government is able to shut out any unwanted candidates. It may also overlook other worthy candidates.

Second, the government is able to control the output of the process through the composition of the committee.<sup>212</sup> For the appointment of Justice Rothstein in 2006, MPs were in a minority on the advisory committee that produced the shortlist. Moreover, each of the four official parties had equal representation on the advisory committee. Since it obtained a

<sup>210</sup> Kirk Makin cited Professor Bruce Ryder of Osgoode Hall Law School as saying that the process imparted "an illusion of accountability". Kirk Makin, "Screening process has its detractors" *The Globe and Mail* (October 19, 2011) A8.

<sup>211</sup> *Id.* (reporting that there were 12 names on the list supplied to the selection panel).

<sup>212</sup> Irwin Cotler and Charlie Feldman raise concerns about having parliamentary secretaries and ministers of the Crown on the selection panels. See Cotler & Feldman, *supra*, note 36, at 268.

majority in the 2011 election, the current government has maintained a majority of three members out of the five on the Selection Panel. The Selection Panel is thus akin to a parliamentary committee where the governing party has a majority and thus is able to control the process and the outcome. However, in terms of both transparency and accountability, the operation of the selection committee is far worse than that of a parliamentary committee. A parliamentary committee operates under prescribed rules of procedure; the selection committee does not. For the most part, parliamentary committees conduct their proceedings in public; the selection committee's proceedings are completely secret. Parliamentary committees produce reports after their reviews of legislation or other issues; the selection committee does not.

Finally, the parliamentary hearings do not restrain the power of the Prime Minister either formally or informally.<sup>213</sup> In 2004, Conservative Party members involved in the proceedings, including future Ministers of Justice Vic Toews and Peter MacKay, criticized the hearings as a "sham" because the Prime Minister's selection had effectively been made.<sup>214</sup> The same could similarly be said of hearings over which Ministers Toews, Nicholson and MacKay presided. At the 2006 hearing, Minister Toews at least stated that the goal of the hearing was to inform the Prime Minister's eventual decision, which was to be made two days after the hearing.<sup>215</sup> The Prime Minister reportedly watched the hearing on television.<sup>216</sup> At the conclusion of the hearing, Minister Toews encouraged members of the committee to forward their comments directly to the Prime Minister regarding their views on the suitability of Justice Rothstein for appointment to the Supreme Court.<sup>217</sup> In the three subsequent hearings, even this pretence was dispensed with and the Prime Minister made the formal announcement the next day. In one case, the Chief Justice announced the swearing-in dates for the new justice before the Prime Minister had formally appointed the "nominee", thus demonstrating the *pro forma* nature of the hearings.<sup>218</sup>

<sup>213</sup> The *National Post* has written that the process allows PMs to appoint poorly qualified or fringe candidates without any sort of political accountability. Editorial, "A land without Borking" *National Post* (October 18, 2011) A14 (noting further that in the case of the 2011 appointments of Justices Moldaver and Karakatsanis, the Prime Minister had not abused his privilege).

<sup>214</sup> *Ad Hoc Committee*—discussed in Mathen, "Choices and Controversy", *supra*, note 14, at 64.

<sup>215</sup> Rothstein Transcript, *supra*, note 177.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Cf. Editorial, "Harper v. Harper" *The Globe and Mail* (October 4, 2012) A14 [hereinafter "Harper v. Harper"] (claiming that the Prime Minister treats the hearings as a "mere formality").

*(b) Holding Decision-makers to Account for Their Decisions*

Accountability “is a means of making responsible the exercise of power”.<sup>219</sup> It requires decision-makers to account for their decisions. In the judicial context, judges are held accountable through the issuance of reasons for their decisions. In the government context, under our system of responsible government, ministers are personally accountable to the House of Commons for the exercise of power; ministers must answer for all actions carried out under their authority.<sup>220</sup> This is a fundamental precept of ministerial responsibility under our Constitution.<sup>221</sup> Based on these understandings of accountability, the reforms must be judged a failure.

To begin, the committee of parliamentarians that interviews the Prime Minister’s nominee has failed to meet any accountability function. The first failure is temporal: the time that the government has given the committees of parliamentarians to prepare for questioning the nominee is simply inconsistent with the exercise of any serious accountability function. This is seen in Table 2 below. In 2004, Mr. Cotler gave the *ad hoc* parliamentarians one day’s notice in announcing the government’s nominees.<sup>222</sup> In 2006, Prime Minister Harper gave MPs three days’ notice; in subsequent hearings in 2011, 2012 and 2013, two days’ notice was provided.<sup>223</sup> This is simply insufficient time for MPs to prepare for hearing in any serious manner.<sup>224</sup> A *Globe and Mail* editorial stated that two days was not enough time to read the nominees’ judgments and any speeches they may have given and to prepare probing questions, and added that the scrutiny was needed.<sup>225</sup>

<sup>219</sup> *Responsibility in the Constitution*, *supra*, note 167.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* See also Hogg, *Constitutional Law of Canada*, *supra*, note 64.

<sup>222</sup> Carissima Mathen wrote about the 2004 hearing that “[t]he hearing clearly was not designed to facilitate greater involvement by the legislative branch. The one-day notice period strains any contrary conclusion.” Mathen, “Choices and Controversy”, *supra*, note 14, at 62.

<sup>223</sup> There was of course no parliamentary hearing for Justice Cromwell’s appointment in 2008. See discussion *supra*, at 127-28 and accompanying notes.

<sup>224</sup> Editorial, “Even good judges need public scrutiny” *The Globe and Mail* (October 18, 2011) A14; Sean Fine, “New Supreme Court judge prepares for vetting”, *The Globe and Mail* (October 2, 2013) A8 [hereinafter “Fine, ‘Vetting’”] (quoting Professor Kathleen Mahoney as saying: “How do you possibly prepare in such a short period of time?” and Professor David Schneiderman as saying that a longer process would be a chance to “see if people had views about the quality of this appointment”); “Harper v. Harper”, *supra*, note 218.

<sup>225</sup> Editorial, “Even good judges need public scrutiny”, *id.*

**Table 2: Time Elapsed for Supreme Court Appointments, 2004-2013**

Judge appointed	Date vacancy announced	Nominee(s) announced	Time elapsed (in days)	Public hearing	Time between nomination and public hearing	Appointment confirmed
Abella and Charron	February 21, 2004 (Arbour)/ March 23, 2004 (Iacobucci)	August 24, 2004	185 days (from date of Arbour's announcement)	August 25, 2004	1 day	August 27, 2004
Rothstein	August 3, 2005	February 23, 2006	205 days	February 27, 2006	4 days	March 1, 2006
Cromwell	April 9, 2008	September 5, 2008	150 days	N/A	N/A	December 22, 2008
Karakatsanis and Moldaver	May 13, 2011	October 17, 2011	158 days	October 19, 2011	2 days	21 October 2011
Wagner	May 18, 2012	October 2, 2012	138 days	October 4, 2012	2 days	October 5, 2012
Nadon	April 23, 2013	September 30, 2014	161 days	October 2, 2013	2 days	October 3, 2013

After the Nadon hearing, Justice Minister MacKay was asked why in each of the four hearings held during Prime Minister Harper's tenure, the committee had only been given two days to prepare for the hearing. Minister MacKay responded: "As a lawyer you're very often called before the court on short notice, and expect to make a case."<sup>226</sup> This is not a satisfactory explanation as to why the government has provided MPs with such little time to prepare for what is purportedly an important function.

It is instructive that the American selection process which served as the inspiration for the Canadian reforms takes less time overall to fill a vacancy and much more of that time is devoted to preparation for the Senate confirmation hearings. In Canada, due to the mandatory retirement of Supreme Court judges at age 75,<sup>227</sup> some vacancies are easily predicted<sup>228</sup> and the pool of candidates is restricted due to regional requirements. The Americans have no mandatory retirements and the President is not restricted by regional considerations, as a matter of either statute or convention. Despite these greater uncertainties, the American process works quicker and more publicly in announcing a nominee and giving typically four to six weeks for the Senate to prepare for confirmation hearings. Perhaps in part due to the lack of time to prepare for the hearings, the Canadian hearings have been criticized as mere "window dressing".<sup>229</sup>

The second failure is structural. In each of the four hearings to date, there has been overlap in membership between the MPs on the selection panel and those on the committee interviewing the nominee.<sup>230</sup> The blame cannot only be laid at the feet of the government on this issue but

<sup>226</sup> Sean Fine, "Nadon skates through nomination hearing" *The Globe and Mail* (October 3, 2013) A3 [hereinafter "Fine, 'Nadon skates'"].

<sup>227</sup> See *Constitution Act, 1867*, s. 99(2).

<sup>228</sup> However, of the eight vacancies considered in this paper, only two (Justice Major in 2005 and Justice Fish in 2013) announced their retirement within a calendar year of their mandatory retirement date. Justice Binnie retired three years before his scheduled retirement date, which could hardly be considered a huge surprise (it was well known that he had to retire in three years' time so the vacancy was expected; it simply came earlier than might have been anticipated). The other resignations were well before the scheduled retirement dates and could be fairly characterized as "surprise resignations": Justices Arbour and Iacobucci in 2004; Justice Bastarache in 2006; Justice Charron in 2011; and Justice Deschamps in 2012. The judges of the Supreme Court have provided the Prime Minister with ample lead time to appoint their successors to the Court in time for the fall session, which begins the second week of October. However, the Prime Minister has taken significant time to announce each nominee. See Table 2, above.

<sup>229</sup> Fine, "Vetting", *supra*, note 224. See also "Harper v. Harper", *supra*, note 218; Editorial, "Judging the judges" *Ottawa Citizen* (October 18, 2011) A10; Editorial, "Judging the judges" *The Vancouver Sun* (October 20, 2011) A16.

<sup>230</sup> Cf. Cotler & Feldman, *supra*, note 36, at 260.

equally at the feet of the opposition parties. Both the Liberals and the NDP have also chosen to put MPs on the interview committee who were members of the selection committee.<sup>231</sup> In such cases, MPs are in the position of interviewing someone whom they themselves recommended. We would not expect the government MPs to challenge the Prime Minister's selection, but we might expect opposition MPs to exercise the sort of accountability function that they do generally in the House of Commons as opposition MPs. However, opposition MPs are unlikely to do so when they themselves have been part of the process. In part, they are being asked to challenge their own decisions. The answer to the question *quis custodiet ipsos custodes* — who guards the guardians? — is not supposed to be “themselves”.<sup>232</sup>

Moreover, when on occasion MPs on the committee of parliamentarians have been critical of various qualifications of the selected nominee, the attempt at accountability has been misdirected at the nominee instead of at those who participated in selecting the nominee. The most egregious example occurred in 2011 during NDP MP's Joe Comartin's aggressive questioning of Justice Moldaver regarding his lack of proficiency in French. Such questioning was both hypocritical and misplaced. It was hypocritical because Mr. Comartin had been a member of the selection panel<sup>233</sup> which according to the Prime Minister unanimously recommended Justice

<sup>231</sup> This problem may be tied to the short notice given for the parliamentary hearings. In 2006, three days' notice was given. In each of 2011, 2012 and 2013, two days' notice was provided. It is thus not surprising that the parties chose to put their representatives from the selection panel on the committee of parliamentarians interviewing the candidate. In 2013, when asked why only two days was given to the MPs to prepare for interviewing the Prime Minister's nominee, Minister of Justice Peter MacKay responded: “As a lawyer you're very often called before the court on short notice, and expect to make a case”. Fine, “Nadon skates through”, *supra*, note 226.

<sup>232</sup> The phrase is attributed to the Roman poet Juvenal from his *Satires* (Satire VI, lines 347-48). See Wikipedia, s.v. “Quis custodiet ipsos custodes”. The phrase is frequently used to invoke questions of accountability for the exercise of power. See, e.g., Martin M. Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens, GA: University of Georgia Press, 1988); Thomas C. Bruneau & Scott D. Tollefson, eds., *Who Guards the Guardians and How: Democratic Civil-Military Relations* (Austin, TX: University of Texas Press, 2008); Afsheen John Radsan, “Sed Quis Custodiet Ipsos Custodes: The CIA's Office of General Counsel?” (2008) 2 J. National Security L. & Pol'y 201; Arthur H. Garrison, “The Judiciary in Times of National Security Crisis and Terrorism: Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipsos Custodes? (When in Times of War the Law Falls Silent, Who will Guard the Guardians?)” (2006) 30 Am. J. Trial Advoc. Rev. 165; and C. Lloyd Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (Toronto: Butterworths, 1981), cited in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] S.C.J. No. 4, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 2 (S.C.C.).

<sup>233</sup> “Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel” (August 5, 2011), online: <[http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc\\_32624.html](http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32624.html)>.

Moldaver for inclusion in the shortlist.<sup>234</sup> Mr. Comartin and the other members of the selection panel should have explained why they recommended Justice Moldaver for appointment. Comartin's blatant and hypocritical attempt to score partisan political points for his party in Quebec was not lost on the media covering the hearing.<sup>235</sup>

While Mr. Comartin's disquiet over the French proficiency of a Supreme Court candidate was understandable, it was a concern that should have been raised in the selection panel process.<sup>236</sup> Instead of hectoring Justice Moldaver on why he did not learn French, the proper question should have been why Justice Moldaver was recommended "unanimously" by the Supreme Court Selection Panel despite his lack of French proficiency. That was a question that should have been targeted at Mr. Comartin and his colleagues and not at Justice Moldaver, who cannot be faulted for not thinking "in his wildest dreams" that he would ever be a candidate for the Supreme Court.<sup>237</sup>

<sup>234</sup> Prime Minister of Canada, "PM announces appointment of Justice Moldaver and Justice Karakatsanis to the Supreme Court of Canada" (October 21, 2011), online: <<http://www.pm.gc.ca/eng/news/2011/10/21/pm-announces-appointment-justice-moldaver-and-justice-karakatsanis-supreme-court>>: "A selection panel, comprised of Members of Parliament from both Government and opposition parties, provided a unanimously approved list of six names for consideration to the Prime Minister and the Minister of Justice."

<sup>235</sup> Tonda MacCharles, "Appointments highlight secret process: Questions have also been raised about Prime Minister Harper's commitment to bilingualism" *The Toronto Star* (October 18, 2011) A6 (calling Joe Comartin's criticism of Justice Moldaver "a strange twist" because Comartin sat on the selection committee); Tonda MacCharles, "Top court accountability an illusion: Supreme Court judges are appointed by PM, 'nominees' just a show" *The Toronto Star* (October 22, 2011) A6. Cf. Tobi Cohen, "Top judicial nominees face grilling by panel of MPs" *Edmonton Journal* (October 20, 2011) A11 (reporting that interim NDP leader Nycole Turmel stated that the NDP did not support the Prime Minister's decision to consider a non-bilingual judge for the Supreme Court despite the fact that the NDP had been part of the process that had put Justice Moldaver on the short list). Mr. Comartin also took an unfair swipe at Justice Rothstein in the Moldaver hearing, asserting, erroneously, that in the parliamentary hearing in 2006, Justice Rothstein had made a commitment to learn French. A review of the transcript from that hearing reveals that Justice Rothstein made no such commitment. Rothstein Transcript, *supra*, note 177. Justice Rothstein took the highly unusual step of speaking to the media to defend his reputation, which had been publicly besmirched by Mr. Comartin. See Kirk Makin, "Judge rebukes NDP MPs for claiming he broke vow to learn French" *The Globe and Mail* (November 2, 2011), online: <<http://www.theglobeandmail.com/news/politics/judge-rebukes-ndp-mps-for-claiming-he-broke-vow-to-learn-french/article4248773/>>. Mr. Comartin did not apologize for his comments. Rather, he clouded the matter by speculating that the promise may have come about through speaking to a third party as part of the work of the Supreme Court Selection Committee in 2006. It is an interesting question whether Justice Rothstein could have sued Mr. Comartin for libel since parliamentary privilege does not apply to the hearings.

<sup>236</sup> It likely was but we do not know because panel members are bound by confidentiality obligations.

<sup>237</sup> Moldaver and Karakatsanis Transcript, *supra*, note 84. Justice Moldaver undertook to learn French and two years later his efforts were on display at the *Senate Reference* hearing, where

Moreover, it demonstrates that the proper person to be questioned about the Prime Minister's selection is either the Prime Minister or the Minister of Justice, because one of them should account for the selection of the Supreme Court justice. Of the six sets of Supreme Court appointments since 2004,<sup>238</sup> only two provided any semblance of accountability on behalf of the executive. Thus, as discussed in Part II, in 2004, Minister of Justice Irwin Cotler appeared before the *ad hoc* committee and explained the basis upon which he had recommended Justices Abella and Charron and the qualities that they possessed.<sup>239</sup> In no other case did either the Minister of Justice or the Prime Minister explicitly articulate the reason why the nominee had been selected. In each of the four parliamentary hearings that we have had to date, the Minister of Justice simply "introduced" the nominee as one would introduce any speaker, by reading his or her bio.

Only in 2006 did Minister of Justice Vic Toews go beyond the nominee's bio to provide additional description of the nominee which may be taken as justification. Minister of Justice Toews said:

Justice Rothstein is well known as a brilliant jurist with remarkable intelligence and great analytical skills. He is well respected among his judicial colleagues, works collegially, and is highly respected in the legal profession. His output of judicial writing is prolific, with over 900 decisions during his 13 years on the bench. His writing is clear, precise, and complete.

Justice Rothstein is known as an extremely hard worker with the highest degree of integrity and personal and professional ethics. He has been described as pleasant, engaging, and thoughtful. He is also an excellent speaker, and I assume that he will have the opportunity to prove me correct in that respect. He is known as a good listener and as one who seeks out all points of view with respect to legal arguments. He is respectful of counsel and is open to sharing his knowledge and

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he asked counsel questions in French. While some might take issue with the quality of Justice Moldaver's French, it is abundantly clear that he has embraced the task of learning the language seriously and making his best efforts to participate in Supreme Court proceedings in French as quickly and thoroughly as possible.

<sup>238</sup> I treat multiple appointments as a single "set" because in each case they were appointed together. Thus, the six are (1) Justices Abella and Charron (2004); (2) Justice Rothstein (2006); (3) Justice Cromwell (2008); (4) Justices Moldaver and Karakatsanis (2011); (5) Justice Wagner (2012); and (6) Justice Nadon (2013).

<sup>239</sup> Carissima Mathen gave Cotler low marks for accountability in his August 2004 appearance before the *Ad Hoc* Committee. See Mathen, "Choices and Controversy", *supra*, note 14, at 62.



experience with law students and others. I am confident that he will make an excellent addition to the Supreme Court of Canada.<sup>240</sup>

In none of the hearings since 2004 did the Minister of Justice answer any questions and in all hearings since 2006, the Minister of Justice's role was described as "chair"; the Minister simply presided over the proceedings and introduced each nominee, effectively reading the nominee's bio. Not only have the hearings failed in accountability, they have defeated accountability by shifting the focus away from the figures who should be held accountable for the appointment selection — the Prime Minister and the Minister of Justice — and onto the person who has been nominated. Nominees may be able to answer many questions, but what they cannot answer is why the Prime Minister selected them.

*(c) Accountability Misplaced*

It is hard to imagine a "perfect" candidate for the Supreme Court. Every candidate has strengths and weaknesses. The hearings have succeeded to some degree in raising some of the perceived deficiencies of each of the candidates: the lack of French proficiency for Justices Rothstein and Moldaver; the relative appellate inexperience of Justices Karakatsanis and Wagner; and the supernumerary status of Justice Nadon.

The hearings have distorted accountability by attempting to require the nominees to account for their deficiencies. These are questions of qualifications, not of accountability. It is valid to ask a judge how he or she will be able to function at the Supreme Court with only a year or two of appellate experience or without the ability to follow hearings in French. But these questions do not go to the critical question of accountability: why was *this* nominee chosen over other qualified ones? That is not a question that the nominee can or should answer. Rather, it is a question for those who make the ultimate decision: the Prime Minister or the Minister of Justice.

*(d) Unexpected Accountability: The Nominee*

The reforms have succeeded in producing accountability of a different sort: accountability for the nominee who is about to ascend to the

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<sup>240</sup> Rothstein Transcript, *supra*, note 177.

highest judicial office in the land. Supreme Court judges, whose decisions cannot be appealed, have limited accountability. They are protected by life tenure, restricted only by mandatory retirement at age 75, and can only be removed in exceptional circumstances. Supreme Court justices are subject to the jurisdiction of the Canadian Judicial Council, and while there have been complaints against Supreme Court justices from time to time, none have ever been validated.<sup>241</sup> Supreme Court judges are accountable to their colleagues and they are held accountable through their decisions, which must be accompanied by reasons. Those decisions may be critiqued by academics, lawyers, ministers, parliamentarians, the media and members of the public, but Supreme Court judges are never called to account publicly for their decisions, other than through their reasons for judgment. Under our system, such attempts would be considered inconsistent with our notion of judicial independence.

Supreme Court judges interrogate lawyers at oral argument; Supreme Court judges themselves are never interrogated. The public hearing for the nominee is the only time that future Supreme Court judges may explain themselves publicly. There is something humbling in requiring a potential justice to explain him- or herself prior to ascending to the highest judicial office. This is a form *ex ante* accountability which, while not as strong as *ex post* accountability, is a form of accountability nonetheless.<sup>242</sup>

### 3. Public Education

The reforms should be judged a success in terms of achieving the objective of improving public knowledge about the Supreme Court and its judges. As discussed in Part IV, this objective has developed over time; it was not part of the motivation in the design of the process.<sup>243</sup> At the Rothstein hearing, Minister of Justice Toews stated that "Canadians deserve to know more about those individuals who are appointed to the

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<sup>241</sup> No Supreme Court of Canada justice has ever faced any serious complaint of judicial misconduct that raised the spectre of removal.

<sup>242</sup> See Devlin, Mackay & Kim, *supra*, note 85.

<sup>243</sup> Writing in 1999, Jacob Ziegel argued that public hearings could serve an educative function for parliamentarians. See Ziegel, "Merit Selection", *supra*, note 28, at 14: "There is also another reason that justifies the introduction of a separate confirmation procedure ... it will help to educate our elected representatives on the impact of the Charter on traditional concepts of responsible government and give them a better appreciation of where the line should be drawn between their role and the Charter's role."

Supreme Court, and we are here today to provide that opportunity".<sup>244</sup> Such statements were repeated by successive Ministers of Justice in 2011, 2012 and 2013.<sup>245</sup> The media has recognized that the hearings give Canadians a chance to get to know the judges before they ascend to the nation's highest court.<sup>246</sup>

There has been significant media interest in the public hearings. The Rothstein hearing was broadcast live on CBC Newsworld, while the others have aired on CPAC. Many journalists attended and reported on each hearing.

The hearings have succeeded in humanizing the judges and the process of judging. Canadians have learned about each of the judges as individuals, including their backgrounds and something about their personalities. They learned that Justice Rothstein is witty and good-humoured, and that he once worked on a railway dining car. They learned that Justice Karakatsanis worked in her family's Greek restaurant and that she is trilingual. They learned of Justice Moldaver's working-class origins in Peterborough, Ontario, of the impact of his parents on his development and the precipitous beginnings to his legal career in law school. And of course, Canadians learned about his lack of proficiency in French and his commitment to learn French from his brother, who holds a doctorate in French literature. Justice Wagner told Canadians about his family

<sup>244</sup> Rothstein Transcript, *supra*, note 177.

<sup>245</sup> See Karakatsanis and Moldaver Transcript, *supra*, note 84 (emphasis added):

This public hearing is intended to bring openness and transparency to the appointments process by allowing Canadians to learn more about those individuals who *will be appointed* to the Supreme Court of Canada ... To the two nominees, thank you very much for opening up about yourself and your vision of this. I think you're going to be a great part of the fabric of this country. You said you and your families are so proud of your being here. I can tell you all of us are very proud. (Minister of Justice Nicholson)

Wagner Transcript, *id.*:

This public hearing is intended to bring openness and transparency to the appointments process by allowing Canadians to learn more about those individuals *who are nominated* to the Supreme Court of Canada ... I believe that this process is a very worthwhile one to gain some transparency, and let Canadians get some familiarity with those who occupy such important positions as those on the Supreme Court. (Minister of Justice Nicholson)

Nadon Transcript, *id.*:

This process, which was begun by our government, is intended to bring greater openness and transparency to the judicial appointments process by allowing Canadians, through this procedure, to learn more about those individuals who *may be appointed* to the Supreme Court of Canada, our highest court in the land. ... This entire process has been very helpful ... in giving Canadians a better understanding not only of who sits and aspires to be a part of the Supreme Court of Canada but also, as Judge Nadon has said, of the quality of the jurists that we have in this country, which is exceptional. (Minister of Justice MacKay)

<sup>246</sup> Editorial, "Judging the judges" *Ottawa Citizen* (October 18, 2011) A10; Editorial, "Judging the judges" *Vancouver Sun* (October 20, 2011) A16.

upbringing in Montreal, how he won his first legal battle at the University of Ottawa by convincing the administration to let him pursue his bachelor's degree at the same time as his law degree, and how he was affected by the events of September 11. Canadians famously learned much about Justice Nadon's hockey prowess, but also about his legal career and his work on the Federal Court.

The hearings have revealed the work of judging in considerable depth. Carissima Mathen opined that the Rothstein hearing "provided a significant educational benefit to those who are not familiar with appellate court decision-making, which incidentally would include many lawyers".<sup>247</sup> While there are those who feel that much more about the judicial process could be revealed through the process,<sup>248</sup> ultimately the hearings should be judged a limited public education success.

## V. TOWARDS A TRULY REFORMED SUPREME COURT APPOINTMENTS PROCESS

### 1. Do We Need Reform?

There are some who believe that the appointment process that has served the Supreme Court well for 129 years<sup>249</sup> is only in need of minor change.<sup>250</sup> Political Scientist Nadia Verrelli has rightly questioned whether various suggested reforms to the appointment process would produce a better Supreme Court than we have had so far.<sup>251</sup> Verrelli's question also raises the possibility that reforms could produce a worse Supreme Court than we have had so far, or could damage the Court as an institution.<sup>252</sup> But doing nothing is also a risk to the Court. As I have shown, the current reforms have failed to meet the promised goals of transparency and accountability. While this failure is certainly no fault of the Supreme Court or of its judges, it has the potential to sow public cynicism about the appointment process and, perhaps, about the Supreme Court. Writing

<sup>247</sup> Mathen, "Choices and Controversy", *supra*, note 14, at 70.

<sup>248</sup> See, e.g., Plaxton, "The Neutrality Thesis", *supra*, note 50.

<sup>249</sup> That is, from the Supreme Court's creation in 1875 until 2004, when the reforms began.

<sup>250</sup> See McLellan, "Foreword", *supra*, note 64, at 606: "The challenge for Canadians is to take a good judicial appointments process and make it even better."

<sup>251</sup> Nadia Verrelli, "Reforming the SCC: Rethinking Legitimacy and the Appointment Process" in Verrelli, *supra*, note 20, 114, at 122.

<sup>252</sup> Mathen, "Choices and Controversy", *supra*, note 14, at 71-72: "Hasty and ill-conceived changes may prove impossible to reverse in the event that they make the current situation worse, not better."

in 2006, Sauvageau, Schneiderman and Taras argued that “[t]o some degree, the court sits precariously on top of a volcano of political distrust and conflict. Although there have been long periods during which the volcano has remained dormant, there are times when the volcano threatens to erupt.”<sup>253</sup>

Politicization of the Court would threaten its stature and its independence. To date, the Court has benefitted from the perceived evenhandedness of appointments to it.<sup>254</sup> We have never had a movement to impeach a Supreme Court judge the way that the Americans had with calls to impeach Earl Warren or, more seriously, to impeach William Douglas in the 1970s. Our judges are not seen as carrying the allegiance of the party of the Prime Minister who appointed them;<sup>255</sup> we have no equivalent of *Bush v. Gore*.

We should not, however, confuse stability with complacency. Lorne Sossin was correct when he wrote in 2008 that “[t]he system of appointing judges in Canada should continue evolving because it is out of step with Canada’s legal and political culture, not because the judges we have are unworthy.”<sup>256</sup> Having promised transparency and accountability in reforming the Supreme Court appointments process, our political leaders should now deliver on it, lest the failure to do so cultivate contempt for themselves, continued loss of trust in our political institutions and a decline in respect for the Supreme Court.

To begin, the government should deliver on its promise of transparency over the appointment process. It should publish a detailed protocol on the Department of Justice website which sets out the process of appointment from beginning to end. Similar guidance documents are

<sup>253</sup> Sauvageau, Schneiderman & Taras, *supra*, note 151, at 26.

<sup>254</sup> Writing in 1999, Jacob Ziegel stated, that “If major controversies have been avoided over the appointment of Supreme Court judges since the adoption of the Charter ... this is largely because successive Prime Ministers — Trudeau, Mulroney, Chrétien — have shared similar constitutional philosophies and because the full impact of the Charter has not yet sunk in.” Ziegel, “Merit Selection”, *supra*, note 28, at 9-10.

<sup>255</sup> On the relative lack of partisan polarization in Canada, see generally Benjamin Alarie & Andrew Green, “Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada” (2007) 58 U.N.B.L.J. 73.

<sup>256</sup> Lorne Sossin, “Judicial Appointment”, *supra*, note 81, at 12. There may be different considerations for appointments to the Supreme Court as compared to other levels of court. It is the court of last resort and the most visible court in the country. Conversely, lower courts are where most citizens would access the Canadian justice system. The different considerations are beyond the scope of this paper.

published by the Privy Council Office<sup>257</sup> This protocol — perhaps to be entitled “Guide to the Appointment of Supreme Court Justices” — would include the constitutional and statutory context for appointment of Supreme Court justices and the information set out below.

The proposed Guide to the Appointment of Supreme Court Justices would clearly set out the qualifications for appointment and the desired qualities for candidates. In order to promote transparency and accountability, these qualities need to be publicly articulated at the beginning of the process and not raised after the nominee has been selected, as Professors Hogg and Baudoin did in each of the public hearings to date. Moreover, as discussed in Part III, Professors Hogg and Baudoin were not consistent in the criteria that they articulated, nor was there any indication that the Supreme Court Selection Panels or the Minister of Justice had actually used the criteria they suggested.

As to the actual criteria, there is no shortage of suggestions of necessary qualities for Supreme Court justices. Former Minister of Justice Irwin Cotler articulated criteria in 2004,<sup>258</sup> and it may be that the government has continued to use these criteria. The Judicial Appointments Commission in England and Wales has a detailed list of “qualities and abilities”.<sup>259</sup> Academics have suggested various qualities necessary for a

<sup>257</sup> See, e.g., *Accountable Government*, *supra*, note 168; Canada, Guide to Making Federal Acts and Regulations: Cabinet Directive on Law-Making, online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/cabdir-dircab-eng.htm>>; Canada, Governor in Council Appointments Guide, online: <<http://www.appointments-nominations.gc.ca/prsnt.asp?page=gicIntro&lang=eng>>. See generally Canada, Privy Council Office, Reports and Publications – by Title, online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=publications-eng.htm>>.

<sup>258</sup> See *supra*, note 31.

<sup>259</sup> Judicial Appointments Commission (England and Wales), Starting a Judicial Career, Qualities and Abilities, online: <<http://jac.judiciary.gov.uk/application-process/qualities-and-abilities.htm>>. According to the Judicial Appointments Commission, “merit” consists of five qualities and abilities: intellectual capacity (a “high level of expertise in your chosen area or profession”, the “ability quickly to absorb and analyse information”, an “appropriate knowledge of the law and its underlying principles or the ability to acquire this knowledge where necessary”); personal qualities (“integrity and independence of mind”, “sound judgments”, “decisiveness”, “objectivity”, the “ability and willingness to learn and develop professionally”, and the “ability to work constructively with others”); ability to understand and deal with people fairly (“an awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs”, the “commitment to justice, independence, public service and fair treatment” and the “willingness to listen with patience and courtesy”); authority and communication skills (an “ability to explain the procedure and any decisions reached clearly and succinctly to all those involved”, the “ability to inspire respect and confidence” and the “willingness to listen with patience and courtesy”); efficiency (“ability to work at speed and under pressure” and the “ability to organize time effectively

Supreme Court justice.<sup>260</sup> For example, Jacob Ziegel's "wish list for the essential attributes of a Supreme Court judge" includes

complete personal integrity; robust health; industriousness and good work habits; a sense of collegiality with other members of the Court to enable the court to discharge its very heavy work load efficiently and without unnecessary friction; an excellent intellect and fine writing skills to match it; a deep understanding of the Canadian constitution and the Charter; and of the role of law in general in contemporary Canadian society; and not least, keep discernment in being able to project the consequences of a judgment on to a broader canvass.<sup>261</sup>

There may be objections to some of these criteria, but it is important to engage in an open discussion about them.

There should be an arm's-length Advisory Committee to advise the Minister of Justice and the Prime Minister on the appointment.<sup>262</sup> As to the composition of the committee, the critical factor is that it not replicate party strength in the House of Commons, lest it become simply another committee controlled by the government of the day; the committee should have equal representation from all recognized political parties. There is a benefit to having some non-MPs on the committee to bring perspectives from other areas such as the bar, the bench and the public. However, such representatives should not dominate the committee, because judges and lawyers have a tendency to prefer people like themselves, which makes it unlikely that candidates who are considered outside the legal "mainstream" would be considered, as discussed below.

The Advisory Committee should be free to consider whichever candidates it identifies through its consultation process. It should be required to consider candidates submitted to it by the Minister of Justice, but it should not be restricted to these candidates. By submitting five to eight names to the Supreme Court Selection Panel, the Minister of Justice has

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and produce clear reasoned judgments expeditiously (including leadership and managerial skills where appropriate)".

<sup>260</sup> See, e.g., Devlin, Mackay & Kim, *supra*, note 85, at 828.

<sup>261</sup> Ziegel, "Merit Selection", *supra*, note 28, at 13 (citations omitted).

<sup>262</sup> Many favour some form of independent nominating commissions for Supreme Court justices. See Kent, *supra*, note 104, at 97; Hutchinson, *supra*, note 20, at 109; Canadian Assn. of Law Teachers, "Canadian Association of Law Teachers Panel on Supreme Court Appointments" (June 2005); Ziegel, "Merit Selection", *id.*; Peach, *supra*, note 85; Devlin, Mackay & Kim, *supra*, note 85; Canadian Bar Assn., *Supreme Court of Canada Appointment Process* (Ottawa: Canadian Bar Assn., 2004); Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995), at 256-67 [hereinafter "Friedland"].

been able to effectively control the process and minimize the role of the Advisory Committee. The Advisory Committee should prepare an unranked short list, along with an evaluation of the strengths and weaknesses of each of the recommended candidates on the short list and the reasons for their recommendation. The deliberations and recommendations of the Advisory Committee should remain confidential, but the procedures under which it operates should not. The mandate and rules of procedure of the Advisory Committee would be set out in the proposed Guide to the Appointment of Supreme Court Justices.

The Advisory Committee should complete a report on its work which would be submitted to the Minister of Justice at the same time as the short list is submitted. The Report should be released at the same time the Minister or the Prime Minister announces the nominee. Many modern judicial appointments processes contain some reporting requirement.<sup>263</sup> This is viewed as an essential element of accountability. For example, under the legislation creating the *ad hoc* Selection Commissions for appointments to the U.K. Supreme Court, those commissions must submit a report identifying who was selected and who was consulted.<sup>264</sup>

The report of the Supreme Court Advisory Committee should contain the following elements: (1) an explanation of the mandate and composition of the Advisory Committee as per the proposed Guide to the Appointment of Supreme Court Justices; (2) a reiteration of the criteria for evaluation as set out in the proposed Guide to the Appointment of Supreme Court Justices; (3) a timeline of the work and meetings of the committee, *i.e.*, when it was established, when and how it met; when it

<sup>263</sup> See, e.g., Ontario, Judicial Appointments Advisory Committee, *Annual Report for the Period from 1 January 2012 to 31 December 2012* (Toronto: Judicial Appointments Advisory Committee, 2013). The Ontario Judicial Appointments Advisory Committee ("JAAC") submits an annual report to the Attorney General which contains, *inter alia*:

- recruitment and outreach strategy;
- legal background of judges appointment;
- appointments from representative groups (Women; Francophones; First Nations; Visible Minorities; and Persons with Disabilities);
- confidentiality policy;
- criteria for Appointment;
- an overview of the process;
- recommendations for changes; and
- profiles of the members of the JAAC.

<sup>264</sup> See *Constitutional Reform Act, 2005*, s. 28 (U.K.) discussed in Shimon Shetreet & Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary*, 2d ed. (Cambridge: Cambridge University Press, 2013) 141.



submitted its recommendations and its report to the Minister of Justice; (4) a profile of the candidates that it considered: (a) number submitted from the Minister of Justice, number suggested by others; (b) professional profile of candidates: judges, lawyers or academics; (c) demographics of candidates for consideration: gender; race; region; linguistic; age, *etc.*;<sup>265</sup> and (5) an explanation of who was consulted, by office although not necessarily by name.

Perhaps most controversially, I do not think that the Minister should be bound by the short list. We should not lose sight of the fact that statute vests the power of appointment with the Governor in Council, which acts on the advice of the Prime Minister. It is arguable that after the *Supreme Court Reference*, this power cannot be altered without a constitutional amendment. Even bracketing the constitutional issue, under our system of responsible government, it is the executive that must account to Parliament for its actions, and then indirectly to the electorate.

Moreover, there is no indication that we would improve the quality of appointments to the Supreme Court by completely fettering the discretion of the Minister of Justice and the Prime Minister. Professor Hogg has argued that the Advisory Committee should be dispensed with altogether because it compromises this principle of executive appointment: "For a single, occasional, high-profile appointment, I do not think the government should be restricted to a short list developed by an advisory committee ... My concern is that the dynamics of deliberation in a diverse committee may eliminate candidates against whom some objection can be made. The tendency, I would fear, is that only the safest and least controversial persons would achieve consensus. Such persons are often excellent judges, but may not always be the best person for the Court at a particular time."<sup>266</sup> Hogg cited the example of the appointments of Bo-

<sup>265</sup> Cf. the discussion of diversity and representativeness of the judiciary in Devlin, Mackay & Kim, *supra*, note 85, and Sossin, "Judicial Appointment", *supra*, note 81.

<sup>266</sup> Hogg, "Appointment of Justice Marshall Rothstein", *supra*, note 49. Professor Hogg also expressed concerns about leaks from the Advisory Committee if too many people are involved with it. While this may have been a concern with the larger and more diverse committee used for the appointment of Justice Rothstein in 2005-2006, it was not a concern with the smaller, "closed" panels consisting solely of MPs used for the subsequent appointments of Justices Moldaver and Karakatsanis (2011), Justice Wagner (2012) and Justice Nadon (2013). On the issue of leaks from the committee of persons being considered, I am not particularly troubled by this for two reasons: (1) there is an increasing tendency for senior executive positions to be open competitions; (2) there is nothing unusual in the disclosure of candidates for senior executive positions. Indeed, such disclosure may foster accountability by allowing the media and the public to debate the pros and cons of different candidates. It may also assist the government in its deliberations by raising issues about a potential appointment such as bilingualism, a controversial past ruling, some questionable

ra Laskin (“[h]e would probably have been regarded as an ‘unsound’ candidate by an advisory committee in 1970”) and Bertha Wilson as ones unlikely to have been recommended by an advisory committee.<sup>267</sup> Hogg is most certainly correct in his assessment, but I do not think that this is reason to dispense with the Advisory Committee; it is reason to ensure that the Minister of Justice is not bound by its recommended short list. Under our constitutional system, the Prime Minister or his or her Minister of Justice is accountable for this appointment and any reformed appointment process should so hold them accountable.

The public hearings should continue but are in need of a drastic overhaul in order to properly serve an accountability function. To date, concerns regarding the politicization of the process and threats to the independence of the judiciary have not materialized.<sup>268</sup>

The three key changes are: (1) the composition of the committee of MPs; (2) the time for the committee of MPs to prepare for its work; and (3) the participation of the Minister of Justice. On the composition of the committee of MPs, this should not include members of the Advisory Committee who recommended candidates for the Minister’s consideration, including, in all likelihood, the candidate selected by the Prime Minister as his or her nominee. Simply put, including such persons in a supposed vetting function is nonsensical, as was seen in the incident involving Mr. Comartin’s challenging of Justice Moldaver’s French-language proficiency.

If the public hearings are to serve a serious accountability function, MPs must be provided with sufficient time to prepare for the hearings: to read and analyze the nominee’s judgments and writings, to consider the analysis and critique of academics and members of the media, *etc.*<sup>269</sup> Instead of two days’ notice, MPs and members of the public should be given at least two weeks’ notice to prepare for the hearings.

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past affiliation or, in the case of Justice Nadon, a serious challenge to his qualification for appointment under the governing statute. We live in an age of transparency and it is simply unrealistic for candidates for any position, especially high public office, to expect secrecy.

<sup>267</sup> Hogg, “Appointment of Justice Marshall Rothstein”, *id.*

<sup>268</sup> Such concerns were raised by the Bar, individual judges and others. See Canadian Bar Assn., *Supreme Court of Canada Appointment Process* (Ottawa: Canadian Bar Association, 2004); Bertha Wilson, “Methods of Appointment and Pluralism” in D. Magnusson & D. Soberman, eds., *Canadian Constitutional Dilemmas Revisited* (Kingston: Centre for Public Policy, 1997) 154, at 162; Kirk Makin, “Top-court Judge defends bench” *The Globe and Mail* (March 3, 1999) A5 (Justice Cory); Peach, *supra*, note 85.

<sup>269</sup> Mathen, “Choices and Controversy”, *supra*, note 14, at 71.

Most importantly, the Minister of Justice should be questioned at the hearing. The hearings have likely succeeded in making Canadians more aware of the work of the Supreme Court and of the new justices,<sup>270</sup> but they have utterly failed in providing direct accountability for the Prime Minister's selection. The Minister of Justice should explain the process and, whether the nominee was selected from the short list or whether the Prime Minister decided to select a candidate who was not on the short list, the Minister would have to explain and justify this decision.<sup>271</sup>

While I do not favour giving Parliament a veto over the appointment at this point,<sup>272</sup> I do think that MPs should have more than a *pro forma* role.<sup>273</sup> At present, they serve a function not much beyond staging in a play produced by the executive. At the least, after the hearing, MPs should submit a report on the nominee and on the hearing to the Minister of Justice and the Prime Minister for their consideration. This will slow down the process at a critical time and hopefully lead to more reflection by both the committee members and perhaps the Prime Minister and Minister of Justice.

## VI. CONCLUSION

Those who championed reforms to the appointment process in the 1990s and 2000s promised Canadians more openness and accountability. They claimed they would empower Parliament and check the unfettered power of the Prime Minister. On these bases, the reforms must be judged a failure, if not worse. Instead of transparency and accountability, they

<sup>270</sup> I have no evidence to support this assertion; it is a speculation on my part based on my review of media coverage on the hearings.

<sup>271</sup> In his landmark report *A Place Apart: Judicial Independence and Accountability in Canada*, Martin Friedland favoured an independent nominating commission that would produce a ranked short list of two or three candidates. If the government did not choose from the short list, then it would be required to justify its choice before some sort of confirmation hearing. Friedland, *supra*, note 262, at 256-67.

<sup>272</sup> See *contra* Ziegel, "Merit Selection", *supra*, note 28; Bill C-60, *The Constitutional Amendment Act*, 30th Parl., 3d Sess. 1978; Pierre E. Trudeau, *The Constitution and the People of Canada* (Ottawa: Government of Canada, 1969); Peter H. Russell, "Constitutional Reform of the Canadian Judiciary" (1969) 7 Alta. L. Rev. 103.

<sup>273</sup> See Mathen, "Choices and Controversy", *supra*, note 14, at 62 (describing the August 2004 hearing in such terms). Though no doubt inadvertently, Minister of Justice Nicholson described the role of the Committee at the Karakatsanis and Moldaver hearing as being "intended to bring openness and transparency to the appointments process by allowing Canadians to learn more about those individuals who *will be appointed* to the Supreme Court of Canada...". Moldaver & Karakatsanis Transcript, *supra*, note 84 (emphasis added).

have brought opaqueness and obfuscation. Instead of addressing the democratic deficit, the reforms have exacerbated it. They have not increased public confidence in the appointment process, nor have they empowered Parliament. The democratic audit conducted in this paper concludes that there is a continued transparency and accountability deficit in the Supreme Court appointment process.

Conversely, it is unlikely that the failed reforms have damaged the judiciary or the Supreme Court. Despite Mr. Cotler's assertion in the epigraph of this paper of the link between the integrity of the appointment process and the independence of the judiciary,<sup>274</sup> there is no indication that the reform process has weakened the Supreme Court or decreased public confidence in the high court or its judges. In terms of making Canadians more aware of the individuals who sit on our highest court, and of the work done by them and by the Court as an institution, the reforms must be judged a success.

Are the reforms worth it? I do not believe we can return to the days before 2004 of a process shrouded in secrecy with unfettered and unaccountable executive power over appointments to our highest court. I have attempted to chart a path for further reforms, which I think would achieve the goals of transparency and accountability without compromising the Supreme Court as an institution. Whether our political leaders will have the will to tackle the new democratic deficit they have created remains to be seen.

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<sup>274</sup> Cotler, "The Supreme Court Appointment Process", *supra*, note 2, at 131.

# **SPECIAL SERIES ON THE FEDERAL DIMENSIONS OF REFORMING THE SUPREME COURT OF CANADA**

## **Should Supreme Court Judges be Required to be Bilingual?**

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**SC Working Paper 2011 - 02**



The Supreme Court of Canada hears and decides cases in both of Canada's official languages, English and French. Its Francophone judges have always spoken English. But as Peter Russell, who studied bilingualism at the Supreme Court more than 40 years ago, observed: "while fluency in English appears to have been a necessary qualification for membership on the Court's bench, fluency in French has not."<sup>1</sup> Even though the situation has improved since the time of Russell's writing, there are still some Supreme Court judges who cannot understand written or oral submissions in French without the assistance of an interpreter or translator, and there is no guarantee that the situation will not persist. Francophone litigants before the Supreme Court face a challenge that is not shared by their Anglophone counterparts: to attempt to persuade judges who do not understand the language in which arguments are presented.

Several attempts have been made to correct this disequilibrium. Some judges have suggested that a party's constitutional right to use English or French before the federal courts and the courts of certain provinces entails the right to be understood by the judge in that language without interpretation;<sup>2</sup> yet, this remains a minority view. When a new *Official Languages Act* was introduced in the House of Commons in 1988 by the Conservative government of the day, it contained a provision explicitly recognizing such a right in the federal courts. However, in the course of the debates an exception was made for the Supreme Court.<sup>3</sup> More recently, at least two private member's bills requiring future appointees to the Supreme Court to possess some proficiency in both official languages, have sparked a country-wide debate<sup>4</sup>. One such bill was passed in the House of Commons but died on the order paper in the Senate at the end of the 40<sup>th</sup> Parliament. At present, the prospects of such a principle becoming law in the near future appear bleak.

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<sup>1</sup> P.H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, Documents of the Royal Commission on Bilingualism and Biculturalism (Ottawa: Queen's Printer, 1969) at 61.

<sup>2</sup> *Société des Acadiens du Nouveau-Brunswick inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549 at 638-647 (Wilson J., dissenting).

<sup>3</sup> This exception is found in the *Official Languages Act*, R.S.C. 1985, c. 31 (4<sup>th</sup> supp.), s. 16.

<sup>4</sup> Being C-232, *An Act to amend the Supreme Court Act (understanding the official languages)*, 40<sup>th</sup> Parliament, 3rd Session (Y. Godin); and C-548, *An Act to amend the Official Languages Act (understanding the official languages — judges of the Supreme Court of Canada)*, 39<sup>th</sup> Parliament, 2nd Session (D. Coderre).

SC Working Paper 2011 - 02

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This paper surveys the arguments in favour and against a statutory requirement to the effect that Supreme Court judges be bilingual. We adopt a public policy perspective rather than a purely legal one. We do not analyze arguments aimed at showing that such a requirement is mandated by existing constitutional provisions (for example, as a consequence of one's right to speak the language of one's choice before the courts) or prohibited by such provisions (for example, if it somehow led to the impairment of a judge's right to speak in the language of choice). Rather, we explore whether, given Canada's political and demographic conditions, there are any substantive reasons for requiring Supreme Court judges to be bilingual. We disclose at the outset our sympathy for a requirement of bilingualism.

We begin by showing that the ability to understand French has increasingly become critical to the performance of the tasks assigned to Supreme Court judges, especially to hear oral argument in French, to read written submissions in French and to interpret bilingual statutes and sections of the Constitution. We then underline how bilingual judges would improve the Court's status and fulfillment of its role as a national institution and ensure the equal status and use of Canada's two official languages. We consider the objection to the effect that a requirement of bilingualism would unduly narrow the pool of candidates from which judges are selected. We present empirical data in order to measure the extent to which this argument is valid. Finally, we assess other proposals that would aim at achieving the same goals.

We decided to write this paper in English because the points we make are usually considered to be obvious by a Francophone audience. We thus speak to those who need to be convinced of our point of view.

### **Hearing and Deciding Cases in both Languages**

When an employer lays down minimal requirements for a job, it should normally do so after considering the tasks that an employee must perform and identifying the skills necessary for the fulfillment of those tasks. Thus, the most convincing arguments for a requirement of bilingualism are based on a consideration of the process by which the Supreme Court actually decides cases.

The Supreme Court hears cases in English and French, as it is the constitutional<sup>5</sup> and statutory<sup>6</sup> right of the parties before it to speak the official language of their choice. For example, of the 62 cases in which it rendered judgment in 2009, 22 were entirely or partly in French, including many cases originating from outside Quebec. Moreover, many of the cases heard by the Court involve the interpretation of bilingual legislation, including the *Canadian Charter of Rights and Freedoms*.

A case before the Supreme Court comprises many types of documents: the record, which contains the judgments of the courts below, the exhibits and the transcripts of the evidence at first instance or before an administrative tribunal, the factums, which are detailed analysis of the legal arguments put forward by each party and are up to 40 pages long; and the authorities, which are the statutes, cases, law journal articles and textbooks cited by the parties. None of that is translated.<sup>7</sup> Hence, a unilingual anglophone judge does not have direct access to a case presented in French by a francophone litigant. That judge will have to rely on the “bench memo” written by a clerk. A bench memo is a report by a law clerk that summarizes the facts of the case, the judgments below and the results of the law clerk’s analysis and research on the legal questions at issue.<sup>8</sup> The bench memo is not communicated to the parties. Thus, the unilingual judge will have access to the arguments of the parties through the eyes of an inexperienced recent law school graduate, rather than directly. While we do not want to trivialize the law clerks’ abilities (we were both law clerks at the beginning of our careers), we think that law clerks are likely to focus more on particular categories of argument (e.g., discussions of precedents or academic literature) that their studies have trained them to recognize, while giving less weight to arguments based on a lawyer’s practical experience. Even though the phenomenon

<sup>5</sup> *Constitution Act, 1867*, s. 133; *Canadian Charter of Rights and Freedoms*, s. 19(1).

<sup>6</sup> *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), Part III.

<sup>7</sup> Some courts or administrative tribunals will issue their reasons in both official languages. This is a rare occurrence. When reasons are prepared in both languages, it is not uncommon for the translation not to be simultaneously released with the original version. See generally *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 20. Some parties go so far as to file with the Supreme Court, at great personal cost, unofficial English translations of decisions of Quebec courts or tribunals issued in French only. This was the case, for instance, in *Enerchem Transport Inc. v. Gravino*, [2008] S.C.C.R. No. 479. Regarding the language of factums, to the best of our knowledge only the Commissioner of Official Languages regularly serves and files French and English versions of his written submissions.

<sup>8</sup> For a description of the work of the law clerks, see M. McInnes, J. Bolton and N. Derzko, “Clerking at the Supreme Court of Canada” (1994) 33 Alta. L. Rev. 58.



is difficult to measure, it may be that law clerks act as a sort of filter when they summarize the arguments made by the parties.

The situation at the hearing is somewhat different. When the case is entirely or partly in French, the court provides simultaneous interpretation during the course of the hearing, which normally last no more than two hours. Unilingual anglophone participants in the hearing, be they judges, lawyers, parties or members of the public, may thus have access to a means of understanding what is said in French. Serious doubts have recently been expressed, however, about the accuracy of the translation. Lawyer Michel Doucet, Q.C., publicly expressed his grave concerns when, by chance, he listened to the English version of his oral argument in *Charlebois v. St John (City)*, a case his client lost by a margin of 5 to 4, broadcast on the Cable Public Affairs Channel. His reaction was as follows:

I listened to the English interpretation of my argument, and I understood none of it. I have a lot of respect for the interpreters and the work they have to do. It must be quite complicated to do it in a political context; I can imagine what it must be in a judicial context, where every word counts, where the interaction between bench and counsel plays a very important role, and where the questions put to counsel and the answers given can have an influence. In those circumstances, if I had to plead another case before a bench on which three judges did not directly understand the language in which I wanted to plead, I might suggest to my client that we proceed in the other language to ensure the nine judges were able to understand the argument.<sup>9</sup>

In fact, the ambivalence of French-speaking lawyers such as Doucet regarding the language they should use before the Supreme Court is reminiscent of the practice of many Quebec lawyers, documented by Peter Russell in the late 1960s, to argue in English to ensure that they would be understood.<sup>10</sup>

More recently, one of us argued a case before the Supreme Court.<sup>11</sup> The overall quality of the simultaneous interpretation was very good. Yet, by comparing the webcasts of the original

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<sup>9</sup> House of Commons, Standing Committee on Official Languages, 8 May 2008, on line: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3482440&Mode=1&Parl=39&Ses=2&Language=E> (accessed 15 June 2011).

<sup>10</sup> P. Russell, *op. cit.*

<sup>11</sup> *de Montigny v. Brossard (Succession)*, [2010] 3 S.C.R. 64. Luckily, the case was argued before a panel of seven judges who all listened to the argument without the assistance of an interpreter. The discrepancies noted here did not result in any injustice to the parties.

SC Working Paper 2011 - 02

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French argument and its English translation, both available on the Supreme Court's website,<sup>12</sup> the following discrepancies may be noted. The French sentence, "The *Gosset* case affirmed the principle of full compensation of the injury," was translated as "*Gosset* says that there has to be comprehensive damage." In addition to the cumbersome style of the translation, the words "comprehensive damage" are imprecise and do not convey clearly the idea of full compensation of the injury. But there is more. In order to contrast the civil law and the common law, which adopt different positions on the compensation of grief, it was said, in French, that "at common law grief is not compensable." The interpreter omitted to translate "at common law," making it sound as if the statement related to the civil law, thus inserting a contradiction in the English version of the argument. Other examples of errors are the translation of "*droit commun*" (which means general law) by "common law" (a totally different concept); saying that one's rights were not breached without specifying that the argument was related to "Charter rights" only, which makes the argument incomprehensible; or saying that the second paragraph of article 1610 of the Civil Code of Quebec was not applicable when the original French argument made exactly the opposite point, that the article was indeed applicable.

An interesting comparison may be drawn with the practice of international arbitration, where language issues are pervasive. In his book-length study of the question, law professor and arbitrator Tibor Várady asserts that most authors on the subject agree that "arbitrators must have an adequate command of the language chosen as the language of arbitration."<sup>13</sup> In this regard, the International Bar Association has adopted a Code of Ethics for international arbitrators that states that a "prospective arbitrator shall accept an appointment only if he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of arbitration."<sup>14</sup> As to the possibility of simultaneous interpretation as a second-best solution, Várady notes that "experience has shown that interpretation is usually the less effective choice. Translation simply cannot fully mirror both the arguments and the art of advocacy. It cannot

<sup>12</sup> Available at <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/webcast-webdiffusion-fra.aspx?cas=32860>

<sup>13</sup> T. Várady, *Language and Translation in International Commercial Arbitration* (The Hague: T.M.C. Asser Press, 2006) at 49-50.

<sup>14</sup> International Bar Association, *Rules of Ethics for International Arbitrators*, on line : <http://www.ibanet.org/Document/Default.aspx?DocumentUid=B21F3C32-190E-4FB0-9750-5459AE4E8498> (accessed 15 June 2011), art. 2.3.

SC Working Paper 2011 - 02

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reflect every emphasis, gambit of persuasion, or undertone. Often, the arguments are not reflected clearly either.”<sup>15</sup>

It has sometimes been suggested that the Supreme Court of Canada’s internal decision-making process would somehow “self-correct” any translation errors that occur during oral argument. For example, a unilingual judge could ask clarification from his or her fellow judges or from law clerks. By its own nature, the accuracy of such a claim is difficult to verify. Moreover, it would require in the first place an awareness of the shortcomings of translation and a willingness to actively seek clarification. A unilingual judge may not feel at ease to seek clarification from law clerks, and may even assume that translation errors will be caught by bilingual colleagues.<sup>16</sup> In any event, a unilingual judge may simply not appreciate the gap between the original arguments presented in French and their translation. Retired Justice John Major, for one, stated: “I was unilingual for all intents and purposes, and I was on the court for 14 years and made use of the translation, which I found to be very good. There was no case from Quebec or elsewhere argued in French in which I did not feel I had a complete grasp of the facts and the positions of the parties.”<sup>17</sup> This position is hard to reconcile with the evidence of discrepancies outlined above and does not bode well for the self-correction theory.

More importantly, however, this claim is reducible to the idea that English-speaking lawyers have a right to an oral hearing without their arguments being filtered by translators, while French-speaking lawyers do not. Yet, despite the fact that applications for leave to appeal have been dealt with in writing for over 30 years, there is very little support for the abolition of oral argument at the appeal stage. The possibility to speak directly to the decision-makers and to attempt to influence them has been a vital part of the Anglo-American judicial tradition. Lawyers will sometimes make concessions or reframe their arguments when they feel that the position articulated in their written factums does not find favour with the court. In our experience, lawyers always refine their arguments between the moment they file their factums and the oral

<sup>15</sup> T. Várady, *op. cit.*, at 53.

<sup>16</sup> During a speech at the University of Ottawa’s Faculty of Law on February 4th, 2010, the Honourable Louis LeBel, a judge of the Supreme Court of Canada, recounted the many hours he devotes in order to ensure that the French and English language versions of the Court’s reasons convey the same meaning.

<sup>17</sup> House of Commons, Standing Committee on Justice and Human Rights, 17 June 2009, on line: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4004136&Language=E&Mode=1&Parl=40&Ses=2> (accessed 16 June 2011).

SC Working Paper 2011 - 02

hearing. At the hearing, judges ask questions about points that may not have been addressed in the factums. Oral argument can be the turning point of a case.

This is also what distinguishes oral argument before a court and making a speech before Parliament, for instance. Legislative processes are largely institutionalized and involve a large number of actors. Effective advocacy does not require personal access to each person involved in the process. The process is highly public and ideas may be pursued at various stages and with a variety of individuals, such as civil servants, members of Parliament, ministers' staff, as well as through the media. This is in contrast with the judicial process. A court's decision-making process is secret. The oral hearing is the only occasion when litigants may engage in direct, real time communication with the decision-makers. It would be highly improper for a litigant to attempt to speak to a judge (or the court's personnel) in private. This sets oral hearings apart from other political fora where persons do not have a right to be heard in their own language.

Another important aspect of a Supreme Court judge's duties is to interpret bilingual legislation. Federal legislation, as well as the legislation of Quebec, New Brunswick, Manitoba, Nunavut, the Northwest Territories and the Yukon is bilingual, and both versions have equal status and authority.<sup>18</sup> The situation is the same for all public general statutes of Ontario since 1992, as well as many other statutes and many regulations in that province.<sup>19</sup> Some legislation in other provinces is bilingual.<sup>20</sup> The same is also true of the *Constitution Act, 1982*, which includes the *Canadian Charter of Rights and Freedoms*. It should be noted that the French version of federal legislation is not a mere translation of the English. Rather, the federal drafting process involves the concurrent drafting of the two versions by two teams of drafters who strive to produce English and French versions that respect each language's drafting tradition. As a result, the French version is often more concise and more precise than the English version.

<sup>18</sup> See the *Canadian Charter of Rights and Freedoms*, R.S.C. 1985, app. II, no. 44, s. 18 (federal and New Brunswick legislation); the *Charter of the French language*, R.S.Q., c. C-11, s. 7(3) (Quebec legislation); the *Interpretation Act*, C.C.S.M., c. 180, s. 7 (Manitoba legislation); *Languages Act*, R.S.Y. 2002, c. 133, s. 4 (Yukon Legislation); *Official Languages Act*, R.S.N.W.T. 1988, c. O-1, s. 7 (Northwest Territories and Nunavut legislation). For the historical development of the rule, see M. Bastarache, N. Metallic, R. Morris, C. Essert, *The Law of Bilingual Interpretation* (Toronto: LexisNexis, 2008) at 16-32; see also *R. v. DuBois*, [1935] S.C.R. 378; *A.G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016.

<sup>19</sup> *French Language Services Act*, R.S.O. 1990, c. F-32, s. 4; *Legislation Act, 2006*, S.O. 2006, c. 21, s. 65.

<sup>20</sup> See for instance: *Language Act*, S.S. 1988-89, c. L-6.1, s. 4 (Saskatchewan legislation).

Giving equal status to both versions surely means that the ultimate interpreter of legislation must be able to understand them both.<sup>21</sup> In truth, a bilingual judge will be in a position to benefit from the additional information contained in the French version. In some cases, even a quick look at the French version might very well resolve an ambiguity that arises from the English version.<sup>22</sup> Moreover, the well established rule of interpretation that requires judges to give bilingual provisions their shared meaning, that is, a meaning that can be supported by both versions, obviously requires the judge to be able to understand both. This rule may in fact lead the court to prefer the French version over the English one.<sup>23</sup> To implement these principles, the court mandates a process the first step of which is the comparison between the English and French versions of the legislation. The Supreme Court even requires litigants to reprint in their factums both versions of the bilingual statutory provisions that are relevant to the cases to facilitate its interpretation of those provisions.<sup>24</sup> It should be obvious that a unilingual judge is not well-equipped to perform that task.

### **A Truly National Institution**

Standing at the apex of Canada's judicial system, the Supreme Court should reflect the country's fundamental values and principles, in particular with respect to language. In this connection, subsection 16(1) of the *Canadian Charter of Rights and Freedoms* states that "English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada." Subsection 16(3) of the same instrument encourages Parliament "to advance the equality of status or use of English and French." In doing so, our constitution clearly excludes regimes, which have been adopted in other countries, where one language has more privileges than the other, where a non-dominant language is official only in certain parts of the country or for regional governments only, or where speakers of a non-dominant language simply have rights

<sup>21</sup> The role of *ultimate* interpreter distinguishes the Supreme Court from other courts: while it might be desirable that judges of the Alberta Court of Appeal, for example, understand French, their failure to take into account the French version of a federal statute could be corrected by the Supreme Court.

<sup>22</sup> See, e.g., *R. v. Mac*, [2002] 1 S.C.R. 856.

<sup>23</sup> *Schreiber v. Canada (A.G.)*, [2002] 3 S.C.R. 269; *R. v. Daoust*, [2004] 1 S.C.R. 217; numerous other Supreme Court judgments that interpreted federal legislation by comparing the two versions are cited in the latter case; *R. v. S.A.C.*, [2008] 2 S.C.R. 675.

<sup>24</sup> *Rules of the Supreme Court of Canada*, s. 41(2)(g). This rule was made in order to avoid, going forward, what occurred in *R. v. Mac*, [2002] 1 S.C.R. 856.

of accommodation rather than equality of status and use. Yet, the presence of unilingual anglophone judges at the Supreme Court has the effect of marginalizing French in a number of ways that are incompatible with the principle of equality of status and use.

One obvious limitation of unilingual judges is that they are unable to draw upon the rich body of Canadian legal literature written in French. There have been a few quantitative studies of academic citations by the Supreme Court over the recent decades.<sup>25</sup> The general picture that emerges from those studies is one where English-language books and articles overwhelmingly dominate, and French-language texts are mostly cited in judgments dealing with civil law or other issues peculiar to Quebec. Thus, the information compiled by McCormick suggests that the Supreme Court cites English and French law journal articles in a ratio of about 7:1.<sup>26</sup> The only francophone author to appear on the list of the most often-cited authors is Albert Mayrand, who ranks 13<sup>th</sup>. The only French-language article that was cited four times or more was written by Louis Perret and was cited four times, whereas there are more than ten English-language articles in that category. The only book originally written in French that ranks among the ten most-often cited works is Pierre-André Côté's treatise on statutory interpretation, most certainly owing to the fact that it was translated in English. Apart from Côté, the most often-cited French-language textbook author is Jean-Louis Baudouin, ranking 13<sup>th</sup>. Black and Richter's study of citations in the period 1985-1990 shows that books written in French about fields of the law that are uniform throughout Canada, such as criminal law and evidence, constitutional law and statutory interpretation, are sometimes cited by francophone judges but almost never by anglophone ones. They concluded: "our study provides support for the claim that while québécois judges are quite

<sup>25</sup> P. McCormick, "The Judges and the Journals: Citation of Periodical Literature by the Supreme Court of Canada, 1985-2004" (2004) 83 Can. Bar Rev. 633; P. McCormick, "Do Judges Read Books, Too? Academic Citations by the Lamer Court, 1991-96" (1998) 9 Sup. Ct. L. Rev. 463; V. Black and N. Richter, "Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990" (1993) 16 Dal. L.J. 377.

<sup>26</sup> Surprisingly, McCormick did not publish statistics concerning the language of the articles cited. However, he provides detailed information about the number of times every major law journal was cited. Assuming that all the articles cited were in each journal's main language of publication, and making adjustment for the number of French and English articles cited from the *Canadian Bar Review*, which he provides, we can infer that the Supreme Court, over the 1985-2004 period, cited English-language articles 1380 times and French-language ones 203 times, a ratio of approximately 7:1.

SC Working Paper 2011 - 02

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prepared to utilize scholarship available only in English, non-Québec judges, as a group, are slow to make use of works available only in French.”<sup>27</sup>

The unilingualism of some judges also severely limits their ability to understand the civil law. Although there are notable exceptions, most civil law literature is written in French. While it is certainly possible to acquire a general idea of the system from materials written in English, the literature that supports specialized arguments of the kind that is likely to reach the Supreme Court are overwhelmingly written in French.

Most importantly, unilingual anglophone judges can only have an indirect access to francophone and, in particular, Quebec society. It is often said that the Supreme Court should render decisions that are adapted to contemporary society. That can only take place if judges keep themselves abreast of social and political developments, through the media or other means. Yet, one gets only a partial and largely inaccurate perspective if one learns about Quebec by reading the *Globe and Mail*, or if one learns about the Francophone community in Ontario by reading the *Ottawa Citizen* or the Acadian community in New Brunswick by reading the *Moncton Times & Transcript*. And, of course, there is the reality and the perception. For many Quebecers, the Supreme Court’s legitimacy to decide questions about Quebec has always been suspicious.<sup>28</sup> Unilingual anglophone judges certainly reinforce that perception, and make the counter-argument that English and French “have equality of status and equal rights and privileges” sound hollow.

### “Narrowing the Pool”?

We thus have strong reasons, related to the nature of the work performed by Supreme Court judges and to the status of the Court as a national institution, to require its judges to be bilingual. We now assess whether the implementation of such a requirement would have severe drawbacks that would counterbalance its advantages. In this connection, opponents of mandatory bilingualism often argue that this would sacrifice “competence” in the name of bilingualism.<sup>29</sup>

<sup>27</sup> Black and Richter, *loc. cit.*, at 394. See also J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada* (Montreal: Thémis, 2007).

<sup>28</sup> See, e.g., Eugénie Brouillet’s chapter in this volume.

<sup>29</sup> This is in substance the argument made by retired Justice John Major in his testimony before the Justice Committee of the House of Commons, 17 June 2009, on line :

SC Working Paper 2011 - 02

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Presumably, this is not meant to say that francophones or bilingual anglophones are per se less competent, nor that learning French diverts a person from the acquisition of more directly relevant skills. Rather, we understand the argument to mean that a requirement of bilingualism would drastically reduce the pool of candidates from which Supreme Court judges are selected, presumably leading to the appointment of less competent judges, or preventing the appointment of “deserving” unilingual jurists.

To assess this argument, we must highlight the fact that when an employer draws the list of requirements for a job, essential requirements – that cannot be dispensed with because their absence compromises a candidate’s ability to do the job – are usually distinguished from desirable qualities – that are not essential, but that would facilitate performance of the job’s tasks. We would argue that bilingualism falls into the first category, notably for the reasons outlined above. It is an essential requirement for the job. Hence, requiring bilingualism does not compromise “competence.” Competence, in fact, includes bilingualism.<sup>30</sup> One would not seriously argue that we should appoint a non-lawyer to the Supreme Court on the basis that that person is extremely wise; one would never say competence or wisdom is sacrificed in selecting judges among those who obtained a law degree.

The competence argument may also be assessed from an empirical standpoint. The question then becomes whether there is a sufficient number of available competent bilingual candidates. Supreme Court judges are usually chosen from among the judges of the courts of appeal. Thus, we conducted a survey of appellate judges (outside Quebec) to measure their rate of bilingualism. We sought information from the court registries concerning the number of judges who could hear a case in French without the help of an interpreter (the criterion employed by Bill C-232) and the number of judges who had some proficiency in French without being able to hear a case in that language. We did not independently verify the information provided. While we suspect some cases of overreporting or underreporting, we make the assumption that those would cancel each other out. The results are as follows:

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<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4004136&Language=E&Mode=1&Parl=40&Ses=2> (accessed 16 June 2011).

<sup>30</sup> The fact that bilingualism is an aspect of competence was recognized by the Canadian Bar Association’s resolution concerning Bill C-232 : *Resolution 10-03-A, Institutional Bilingualism at the Supreme Court of Canada*, adopted at the CBA’s annual meeting in Niagara, Ontario, 14-15 August 2010, on line : <http://www.cba.org/CBA/resolutions/pdf/10-03-A.pdf> (accessed 16 June 2011).

SC Working Paper 2011 - 02

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Province	Number of judges	Judges who can hear an appeal in French without translation		Judges with some knowledge of French	
British Columbia	24	3	13%	4	17%
Alberta	17	5	29%	5	29%
Saskatchewan	11	4	36%	6	55%
Manitoba	8	2	25%	4	50%
Ontario	22	4	18%	4	18%
New Brunswick	9	5	56%	8	89%
Nova Scotia	8	0	0%	4	50%
Prince Edward Island	3	0	0%	0	0%
Newfoundland and Labrador	9	0	0%	0	0%
Federal Court of Appeal	13	7	54%	7	54%
Total	124	30	24%	42	34%

These figures show that there is a sizeable pool of bilingual appellate judges from which Supreme Court judges can be appointed.<sup>31</sup> They also show that these bilingual judges are not concentrated in Central Canada (i.e., Ontario and New Brunswick), but that bilingual judges are present in provinces that are often thought to be almost exclusively English-speaking, such as Alberta and Nova Scotia.

On the other hand, one could argue that a rate of bilingualism of about 25% excludes three quarters of the appeal court judges from consideration. At first sight, this might be cause for concern, but a more in-depth analysis alleviates the fears. Over the last two decades, there has been only one of the nine members of the Supreme Court who was unilingual. Thus, it has been possible to find a good number of bilingual judges. Moreover, several of the persons who were rumored to be on the "short list" for the recent appointments were bilingual. Even with respect to a more distant past, Russell noted that anglophone judges such as Justices Strong, Anglin, Abbott, Judson, Cartwright, Kerwin and Kellock understood French,<sup>32</sup> and the same was true of Chief Justice Duff.<sup>33</sup> This suggests, first, that bilingualism is not a major impediment to finding competent candidates and, second, that there is a correlation between the ability to understand

<sup>31</sup> It may be that this is partly attributable to the status of French in criminal proceedings throughout Canada; *Criminal Code*, R.S.C. 1985, c. C-46, Part XVII; see generally *R. v. Beaulac*, [1999] 1 S.C.R. 768.

<sup>32</sup> P.H. Russell, *op. cit.*, at 62. In a 1952 speech, Justice Cartwright asserted that all Supreme Court Justices could at least read French and were generally able to understand oral argument in French: Remarks to the 45<sup>th</sup> Annual Banquet of the American Association of Law Libraries, (1952) 45 *Law Library Journal* 437 at 446-7.

<sup>33</sup> D.R. Williams, *Duff: A Life in the Law* (Vancouver: UBC Press, 1984) at 69-70.

French and other qualities that are deemed essential for a Supreme Court judge. Although there are debates regarding who should be appointed, one rarely hears that someone was appointed because he or she spoke French, or that someone was not appointed for the opposite reason, nor arguments that the past appointments have sacrificed competence for bilingualism. Thus, recent history shows that is a correlation between knowledge of French and being regarded as fit for an appointment to the Supreme Court.

It might be risky to infer causality, but three explanations may be attempted. First, it may be that the Prime Minister is already considering bilingualism as a very important asset, if not a prerequisite for appointment. If that is true, the pool of candidates would already have been “narrowed” and the adoption of a statutory requirement would simply officialize long standing practice and prevent future exceptions. Second, knowledge of a second language may be a sign of an openness of mind or intellectual curiosity that would be correlated with the qualities expected of a Supreme Court judge. Third, the incentives in Canada’s judicial system are such that judges who consider themselves as potential candidates for the top court make an effort to learn French, as it has been known for at least 30 years that speaking French is an asset, if not an informal requirement for a Supreme Court appointment. Indeed, superior and appeal court judges in Canada have the opportunity of taking free French lessons, and close to 200 judges take advantage of that opportunity every year.<sup>34</sup> (This large number suggests that judges do so not only by hope of promotion, but simply because they regard knowledge of French as a useful asset for the discharge of their duties.) Some judges have also used their study leave to spend a few months in a Quebec university, thus improving their knowledge of the civil law, as well as their French. Moreover, there is every reason to believe that the rate of bilingualism among appellate judges will continue to increase, as a result of the availability of very popular French immersion programs, of the greater emphasis on bilingualism and bijuralism in certain law schools (e.g., McGill and Ottawa) and of the increased popularity of exchange programs.

A variant of the “narrowing the pool” objection is that it might hamper the appointment of judges from more diverse backgrounds, in particular, an aboriginal Supreme Court judge. We do not take issue with the idea that the court should be as representative as possible of Canadian

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<sup>34</sup> Personal communication with the Commissioner for Federal Judicial Affairs, 20 May 2010.  
SC Working Paper 2011 - 02

society, and we hope that an aboriginal person will one day be appointed to the Court. However, the pursuit of diversity is not a reason to ignore an essential requirement for the job. A non-lawyer could never be appointed to achieve representation of ethnic minorities; neither should a person who does not speak French be appointed either. Moreover, the objection is based on the premise that most aboriginals or members of ethnic minorities do not understand French. This is an unverified assumption. According to media reports, one of the persons currently considered for filling a vacancy at the Court comes from a minority ethnic group and speaks French. We have not conducted a survey of Canada's leading aboriginal judges, but we know anecdotally that at least one of them has a fair level of understanding of French. There are a number of young aboriginal lawyers who speak English and French and who, one day, could serve on the Court.

### **Second-Best Solutions?**

Are there any other ways of achieving the goals identified above without requiring each judge of the Supreme Court to be bilingual? At its 2010 summer annual general meeting, the Canadian Bar Association adopted a resolution calling on the Court to become "institutionally bilingual" but explicitly rejecting a requirement of bilingualism for individual judges. According to the resolution, subsection 16(1) of the *Official Languages Act* should be amended to provide the right of members of the public to be heard by the Supreme Court without the help of an interpreter. While the details are not spelled out in the resolution, this apparently means that the Supreme Court would hear cases involving a French-speaking litigant in a panel of five or seven judges, all of whom would be bilingual. Thus, in making appointments, the Prime Minister should ensure that there are no more than two unilingual judges on the Court at any given time. This raises obvious practical problems. A party, even an intervener, could decide to use French in order to disqualify a unilingual judge for reasons entirely unrelated to language. Most constitutional cases, in which the Attorney-General of Quebec routinely intervenes, would be decided by a panel of seven judges in which the Western provinces would be under-represented (if the pattern of the last 20 years continues). Aside from its impact on the development of the law (in division of powers jurisprudence, for example), such a measure would not address the other problems caused by unilingual judges. Even in cases involving English-speaking litigants only, the Supreme Court is often called upon to interpret bilingual legislation, and the problem of unilingual judges not being able to understand the French version of the statute would remain.

Neither would such a proposal remedy the under-representation of French-language literature in the authorities referred to by the Court.

It has also be suggested that the coming into force of a measure like Bill C-232 should be delayed by a number of years that would allow candidates to learn French or upgrade their knowledge of that language.<sup>35</sup> The objective would be one of fairness towards persons who did not have sufficient notice of this new requirement for the job they relish. This suggestion is problematic in two ways. First, it sees an appointment to the Supreme Court as a sort of entitlement of the individual. We think this is misguided: those appointments are made in the interests of the country and its judicial system, not in the interest of the individuals who are appointed. Requiring bilingualism is in no way unfair to unilinguals. Second, we would argue that there has already been sufficient lead time for the enactment of a requirement of bilingualism. An exception for unilingual judges to be appointed to the Supreme Court was carved out nearly 25 years ago, in subsection 16(1) of the *Official Languages Act*. It has been known for decades that knowledge of French is at least a highly valued skill. Any jurist embarking on a long-term plan to position him- or herself as a candidate for the Court would already have taken measures to learn French. How many more years could reasonably be required?, we ask.

Another alternative would be to give new appointees with a partial understanding of French a "period of grace" within which they would be required to improve their French abilities to level required for them to hear a case without the aid of translation services. The data shown above suggests that this would enlarge somewhat the pool of eligible candidates. Indeed, it is often pointed out that some current members of the Supreme Court did not, on their appointment, possess the requisite level of French, but that they acquired it later and are now able to hear cases in French. However, it should be noted that such a policy has produced uneven results in the higher echelons of the federal public service. It would also be difficult to enforce such a rule: would we require a judge who has not achieved the requisite fluency within the prescribed delay to step down? It may be that in practical terms, a "period of grace" rule would not be very different from what was proposed in Bill C-232. It did not mandate any form of testing, so that

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<sup>35</sup> It should be noted that the requirements of subsection 16(1) of the *Official Languages Act*, RSC 1985, c 31 (4<sup>th</sup> Suppl.) only entered into force five years after their enactment.  
SC Working Paper 2011 - 02

whether a judge meets the required standard would have fallen upon the judge's individual conscience.<sup>36</sup> Thus, a judge who reads and understands French but who has some doubts as to his or her capacity to hear a case in French could accept an appointment, take measures to upgrade his or her level of French within a couple of years and take measures in the interim to ensure the proper understanding of oral argument.

The polarization of the debate concerning the status and use of French in the Supreme Court of Canada and the fierce opposition of many to the very idea of a formal requirement of bilingualism has made it very difficult to seriously discuss how such a measure could be implemented. While we firmly believe that the time has come to require Supreme Court judges to be bilingual, we acknowledge that a serious discussion about the modalities of application could make the principle more acceptable. For example, political expediency may call for a two-year "period of grace" applicable to persons appointed in the next ten years who have partial knowledge of French but not to the level required to hear a case. That could alleviate fears about "narrowing the pool," especially with respect to Aboriginal judges. It could also be made clear that there would be no testing regime, especially not at the public interview that the current government has indicated it would hold with nominees. Such a regime might deter potential candidates who understand French but whose speech does not match the understanding.

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The Constitution requires the Supreme Court of Canada to be a bilingual institution fully able to hear cases in French. Simultaneous translation at the hearing is not an adequate substitute to judges being able to listen to argument in French. It undermines the equality of status and use of French and English. As the ultimate interpreters of bilingual legislation, Supreme Court judges have a mandate that goes beyond that of trial and appellate judges in certain parts of the country. To discharge these duties, the Court needs a full complement of judges who understand Canada's official languages. The experience of the past decades and the results of our survey show that there is a good number of bilingual jurists who have all the qualities to be appointed to the Supreme Court. Requiring bilingualism does not compromise competence. Rather, it should

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<sup>36</sup> As suggested by Justice Wilson in *Société des Acadiens du Nouveau-Brunswick inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549 at 638-647. See also, in the context of international arbitration, T. Várady, *op. cit.*, pp. 51, 60.  
SC Working Paper 2011 - 02

at last be recognized that understanding English and French is a required skill for being appointed to the Court.

**Judging: the Challenges of Diversity**

**Remarks of the Right Honourable Beverley McLachlin, P.C.  
Chief Justice of Canada**

**Judicial Studies Committee Inaugural Annual Lecture**

**June 7, 2012  
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A. INTRODUCTION

Lord President Hamilton, Lord Justice Clerk Gill, Cabinet Secretary for Justice, Mr. McAskill, Senators of the College of Justice, Master of the Rolls Lord Neuberger, distinguished guests, ladies and gentlemen. I must begin by thanking you, Lord Hamilton, on two counts: first, for those very kind words of introduction; and second for inviting me to deliver the Judicial Studies Committee's inaugural annual lecture.

It is a great honor to appear before this very august audience. I am particularly pleased to be here in Edinburgh, although our stay in your beautiful city is regrettably short.

The links between Scotland and Canada run deep. Over the course of three centuries, many thousands of sons and daughters of Scotland left their homes in search of life in Canada. They were farmers, craftsmen, soldiers, merchants, bankers, politicians, lawyers and judges. They include our first Prime Minister, Sir John A. MacDonald and our longest serving Chief Justice, Sir Lyman Duff. Their contribution to my country has been profound and enduring.



Indeed, the list of distinguished Canadians with Scottish roots is such that some have suggested the Scots should be Canada's founding people. Despite the claims made at our many annual Robbie Burns Day parties, the truth is more complex.

Canada was born of diversity — the coming together of three groups of peoples - the aboriginal nations, the French settlers of Acadia and Quebec, and English speaking peoples from England, Scotland and the United States.<sup>1</sup> And Canada is becoming ever more diverse. According to a recent Census 1 in 5 Canadians were born outside of Canada and nearly 1 in 6 are visible minorities.<sup>2</sup> In two of our largest cities, Toronto and Vancouver, Caucasians are in the minority. We continue to be a country of immigrants, and all signs suggest that diversity in Canada will only increase in the years to come.

Scotland has a different history of human settlement and migration. If we go back a few millennia, we find Celts, invaded by Danes and Norse, succeeded by the French and English. They merged in time to become the Scottish people. Now, once again, new people from far

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<sup>1</sup> John Ralston Saul, *A Fair Country* (Toronto: Viking Canada, 2008).

<sup>2</sup> Statistics Canada, *Selected Demographic, Cultural, Educational, Labour Force and Income Characteristics (830), Mother Tongue (4), Age Groups (8A) and Sex (3) for the Population of Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2006 Census - 20% Sample Data.*

places are settling in Scotland. And, as in Canada, the ethnic minority population is growing at a much faster rate than the general population.<sup>3</sup>

Diversity enriches a society. But it also presents challenges. The judiciary is not immune from these challenges — which brings me to my subject tonight, judging in a diverse society.

I will begin by describing some of the challenges of judging in a diverse society. I will then discuss three related responses that assist in meeting these challenges: (1) an informed approach to judicial impartiality; (2) an understanding of social context; and (3) a Bench that reflects the diversity of the population.

B. THE CHALLENGES OF JUDGING IN A DIVERSE SOCIETY

Judging in a diverse society presents a number of special challenges. Let me mention a few.

The first challenge of judging in a diverse society is that people appearing in Court — whether witnesses or litigants — will often be very different from the judge hearing the case.

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<sup>3</sup> Office of the Chief Statistician, Analysis of Ethnicity in the 2001 Census - Summary Report, February 2004.

Their experiences, values and perspectives, even the language they speak, may be quite foreign to the judge. This may impact on the ability of the judges to appreciate their circumstances, assess their credibility, and craft appropriate remedies.

A second challenge of judging in a diverse society is that the issues that come before the Court may be different. They may be entirely novel. Or they may be familiar, but presented in a new way with new implications. As a law student, I never dreamed that I would be called upon to decide whether a religious Muslim woman may be permitted to wear a Niqab while testifying, or whether same-sex couples should be allowed to marry, or whether children can refuse life-saving medical treatment on religious grounds, to take but three examples. New questions and new contexts inevitably challenge pre-conceived notions and expectations.

A third challenge of judging in a diverse society is the challenge of complexity. The legal issues that arise tend to be complex, and to involve competing values. The problems are polycentric. Professor Lon Fuller evokes the metaphor of a spider web<sup>4</sup> to describe such problems. Not only does one need to sort out the different and intersecting strands of the web; one must proceed knowing that to pull on one strand is to set up a new and complex dynamic that impacts on the other strands — sometimes subtly, sometimes dramatically.

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<sup>4</sup> Lon L. Fuller, *Law and Morality* (New Haven: Yale University Press, 1969).

A final challenge of judging in a diverse society is the challenge of maintaining confidence in the justice system. Members of minority communities may have emigrated from countries afflicted by corruption, where the administration of justice is neither independent nor impartial. They may not trust judges; they may assume that the system is stacked against them. They thus approach the justice system with distrust. Not trusting or understanding the justice system, they may avoid it or find alternative routes to what they want or deem just. Ultimately, public confidence in the judiciary — essential in a society based on the rule of law — may be eroded.

In his most recent book, *Making Our Democracy Work*, Justice Stephen Breyer of the United States Supreme Court poses a “puzzling question” — why does the public accept and follow decisions made by the judiciary, a body he describes as “inoffensive, technical, and comparatively powerless.”<sup>5</sup> The answer to this question, he suggests, rests in the confidence of the people. This is the ultimate challenge of judging in a diverse society — to ensure that all segments of the community learn to have confidence that administration of justice is fair, independent and impartial.

### C. MEETING THE CHALLENGES

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<sup>5</sup> Stephen Breyer, *Making Our Democracy Work: A Judge's View* (New York: Alfred A. Knopf, 2010) at 11.

Having discussed the challenges of judging in a diverse society, let me look at three ways we can ensure that we meet these challenges: first, by an informed concept of judicial impartiality; second, by an appreciation of social context; and third, by a diverse bench.

1. An Informed Approach to Impartiality

Impartiality lies at the heart of the judicial role. Judges have but one task: to judge between competing claims, impartially in accordance with the law. The good judge has many attributes — intelligence, mastery of the law, sound judgment, patience. But much the same can be said for many who hold important offices or positions. What sets judges apart is their impartiality. Judges must approach their every task with absolute impartiality, irrespective of the person before them or the issue to be decided.

Everyone, you say, understands this. Indeed, it is why the blindfolded figure of *Justitia* is an enduring metaphor for the judicial function. But what does impartiality really mean? And how does it play out in a diverse society, made up of people of many creeds and cultures? Let me suggest that the image of the blind judge must be supplemented by the image of the informed judge, hence the phrase, “informed impartiality”.

Understanding impartiality begins with the recognition that judges are human beings. The great American judge Jerome Frank once wrote: “Much harm is done by the myth that,

merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.”<sup>6</sup> Like everyone else, judges possess preferences, convictions and — yes — prejudices. Judges are not social or political eunuchs.<sup>7</sup> They arrive at the bench shaped by their experiences and by the perspectives of the communities from which they come. As human beings, they cannot help but to bring these “leanings of the mind” to the act of judging. In short, judging is not an exercise of cold reason, uncontaminated by personal views and preconceptions.

The myth decried by Judge Frank is harmful because if we fail to recognize the existence of a subjective element in judging, we cannot get a grip on what is required for a judge to be impartial. Subjectivity intrudes on judicial thinking at all levels. Take for instance the fact-finding exercise. In assessing expert evidence or the testimony of ordinary witnesses, judges must make decisions about credibility and must draw inferences from the evidence they accept — and they cannot do this without drawing on their general knowledge and understanding of human behaviour.

Of course, logical argument — reasoning by deduction, induction and analogy — plays a prominent role in judging. It is tempting to think that this leaves little room for subjective feelings. Yet, research on how the brain works suggests otherwise. Scholars argue that reason is not a faculty separate from the emotions, and emphasize that even the most abstract exercises of

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<sup>6</sup> *In re J.P. Linahan Inc.*, 138 F.2d 650 (1943 - 2<sup>nd</sup> Cir.), at pp. 652-653 [reference omitted.].

<sup>7</sup> J.A.G. Griffith, *The Politics of the Judiciary* (Manchester: Manchester University Press, 1977), at pp. 187-190; see also B. Wilson, “Will Women Judges Really Make a Difference”, (1990) 28 *Osgoode Hall L.J.* 507, at p. 509.

reasoning are responsive to our emotions.<sup>8</sup> The intertwining of logic and feeling is simply a fact about how the human mind works.

This is no less true in the legal domain than it is in everyday life. As Baron MacMillan — a great Scottish judge — wrote with some insight, “the warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice is to be done”.<sup>9</sup> Michael Kirby, recently of the High Court of Australia, put the point well:

Decision-making in any circumstance is a complex function combining logic and emotion, rational application of intelligence and reason, intuitive responses to experience, as well as physiological and psychological forces of which the decision-maker may only be partly aware.<sup>10</sup>

In the end, it is clear that a variety of subjective influences — our beliefs about the world and about human nature, our emotions, and our sense of justice — are inescapably part of judicial decision-making.

We tend to think that reasoning by induction and analogy constitute “good judging”, and decision-making on gut-feeling or instinct is bad judging. We prize eloquent well-reasoned judgments, while deploring “palm tree” justice. But the truth is more complex. Our instincts,

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<sup>8</sup> See, for example, J. Nedelsky, “Embodied Diversity and Challenges to Law” (1997) 42 *McGill L.J.* 91, at pp. 101-103.

<sup>9</sup> Lord MacMillan, *Law and Other Things* (Cambridge: Cambridge University Press, 1938) at pp. 217-218.

<sup>10</sup> M. Kirby, “Judging: Reflections on the Moment of Decision” (1999) 18 *Aust. Bar Rev.* 4, at p. 21.

including our instincts for what is fair or right or just — are the distillation of all we have learned over our lifetimes.

In his recent book, *Thinking, Fast and Slow*,<sup>11</sup> Nobel prize-winner Daniel Kahneman argues that the expert, and this includes judges, is an expert precisely because her experience leads her to quickly and instinctively sort out complex patterns of data and come to the right conclusion. Kahneman uses the metaphor of two thinking systems — System 1 and System 2. The System 1 brain is our instinctive response based on our accumulated lifetime of study and experience. It is a way to jump to quick and (usually) valid conclusions. The System 2 brain is the intellectual verification that “checks” the System 1 response. It asks whether the instinctive response is correct and appropriate, and evaluates whether a departure from past practice is necessary — in a word, whether to innovate and, if so, how. Whether one is an artist, a doctor, a scientist or a judge, both systems of the brain must be engaged for effective decision-making.

Kahneman illustrates the point with a study done on Israeli parole judges.<sup>12</sup> He found that the number of rejections increased sharply as the morning wore on and lunchtime approached. The story was picked up by the popular press and run under the variants of headline, “Hungry judges are bad judges”. There may be wisdom in that but Kahneman’s explanation is more profound. What was happening, he hypothesizes, was that as the judges became more tired, more pressured (that stack of unopened files) — and yes, perhaps more hungry — they were less willing (or perhaps less able) to think slow! So they fell back on the

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<sup>11</sup> Daniel Kahneman, *Thinking Fast and Slow* (Toronto: Doubleday Canada, 2011).

<sup>12</sup> *Ibid*, pp. 43-44



comfortable but safe default and easier position of denying requests for parole. Instead of using the System 2 brain to check and reconceptualise the situation, they contented themselves with the easier System 1 response.

The distinction between slow thinking and fast thinking helps us to understand our reaction to social diversity. The fact that our thinking is based in instinctual responses — the System 1 brain — means subjective elements automatically enter into it. This means that along with all the valuable knowledge and experience we have embedded in our System 1 brain, come certain unhelpful, misleading subjective elements, such as prejudices and biases, which, if not checked by the intellectual processes of our System 2 brain, will enter into the decision-making process and skew it.<sup>13</sup> And this risk is increased in a diverse society where judges are confronted with a great variety of individuals with experiences and values different from their own.

The key to maintaining impartiality in a diverse society is slow-thinking, System 2 reflection that, for want of a better term, I call “conscious objectivity”. Impartiality in a diverse society lies not in the elimination of all preconceptions and personal inclinations. Using the intellectual tools of reasoning and the values that underlie our justice system and democratic society, the judge evaluates her initial “fast think” response, and then goes on to identify inappropriate preconceptions and prejudices that it may contain, thus consciously eliminating illegitimate elements from the reasoning process.

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<sup>13</sup> See: *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), *per* Scalia J. at p. 1155; M. Omatsu, “The Fiction of Judicial Impartiality” (1997) 9 *Canadian Journal of Women and the Law* 1, at p. 6; K. Mason, Unconscious Judicial Prejudice@ (2001) 75 *Aust. L.J.* 676, at p. 680; and *In re J.P. Linahan Inc.*, *supra*, at pp. 651-652.

These practices are easily stated. Their actual attainment, however, is much more difficult. It requires constant attention to the processes involved in reaching a particular factual or legal conclusion. And it requires that the judge cultivate certain attitudes and dispositions — in particular, introspectiveness, openness, and empathy. I will deal briefly with each of these attitudes.

The first attitude that the judge must cultivate is introspectiveness. A judge must be willing to take moral stock of herself.<sup>14</sup> As Justice Frank put it “[t]he conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect.”<sup>15</sup> Similarly, Aharon Barak, former Chief Justice of the Supreme Court of Israel, writes that a judge “must be capable of looking at himself from the outside. He must be capable of analyzing, criticizing and controlling himself.”<sup>16</sup> The purpose of introspection is to obtain a clearer understanding of the individual judge’s mental and ethical susceptibilities. In a diverse society introspection is essential to ensuring that the phenomenon of difference confronting the judge does not skew the decision-making process.

The second attitude the good judge must possess is openness. The judge’s mind must be open and receptive to ideas and arguments that may compete with the judge’s personal preconceptions. This willingness to receive and act upon new and different ideas, arguments and

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<sup>14</sup> A. Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 *Harv. L. Rev.* 16, at p. 56.

<sup>15</sup> *In re J.P. Linahan, Inc.*, *supra*, at pp. 652-653; see also K. Mason, *supra*, at p. 686.

<sup>16</sup> A. Barak, *supra*, at p. 56.

views lies at the heart of true impartiality.<sup>17</sup> Impartiality implies an appreciation and understanding of the different attitudes and viewpoints of the parties to a controversy.<sup>18</sup> Litigants can have no absolute expectation that their perspective will be determinative. But they have an unqualified right to a judge who will truly hear them and who is willing to be convinced by views different from her own.

A disposition to openness or “enlargement of mind”<sup>19</sup> is linked to the third attitude necessary to good judging — empathy. Empathy emphasizes the common humanity of us all — judges, litigants, witnesses and all other participants in the justice system. It is the ability to see the world from the perspective of others and become engaged in their experience<sup>20</sup>. Empathy recognizes the legitimacy of diverse experiences and viewpoints. Justice Bertha Wilson, who immigrated to Canada from Scotland and became the first woman on the Supreme Court of Canada, wrote that judges must, or at least earnestly attempt to, “enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge.”<sup>21</sup> The judge, by an act of imagination, should systematically attempt to imagine how each of the contenders sees the situation. This is critical to impartiality and openness. Empathy

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<sup>17</sup> Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowansville, Quebec: Yvon Blais, 1991), at p. 12; *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia*, 1990, at pp. 26-27.

<sup>18</sup> B.L. Shientag, “The Virtue of Impartiality” in J.R. Winters, ed., *Handbook for Judges: An Anthology of Inspirational and Educational Writings for Members of the Judiciary* (American Judicature Society, 1975) at pp. 57-58.

<sup>19</sup> J. Nedelsky, *supra*, at p. 107.

<sup>20</sup> K.L. Karst, “Judging and Belonging” (1987-1988) 61 *S. Cal. L. Rev.* 1957, at p. 1966.

<sup>21</sup> B. Wilson, *supra*, at p. 521.

does not require one to adopt particular cause. It simply allows the judge to truly hear the parties who appear before her. Empathy of this sort sustains rather than defeats impartiality.<sup>22</sup>

In a diverse society, this is what litigants, irrespective of their background, are entitled to: a judge who is aware of the influence of her own experiences and perspectives, who is willing to act on different views and ideas and who has the capacity to truly hear and understand the perspectives of all those who come before her.

## 2. Appreciating Social Context

I have spoken of the importance of impartiality and openness to competing perspectives and experiences for judging in a diverse society. However, this only gets the judge so far. It is important that the judge truly understand and appreciate the various perspectives that are relevant to resolving the case in a just fashion. This is particularly important in a diverse multi-cultural society. The judge must understand the facts and the law. But he should also understand the social context from which they arise.

What do we mean when we say a good judge appreciates the social context of the dispute before her? We mean, that the judge understands not just the legal problem, but the social reality out of which the dispute or issue before the court arose. Attentiveness to social context is

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<sup>22</sup> K.L. Karst, *supra*, at p. 1966.

nothing new. Good judges have long recognized that the law is a human endeavour aimed at governing the behavior of human beings in all their diversity and complexity. Judges apply rules and norms to human beings embedded in complex, social situations. To judge justly, they must appreciate the human beings and situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions. As our Court has stated: "Judicial inquiry into context provides the requisite background for the interpretation and application of the law".<sup>23</sup>

Understanding the social context of disputes and legal issues became particularly important in Canada after the adoption of the *Canadian Charter of Rights and Freedoms* in 1982. The *Charter* requires judges to assess legislation and government action for compliance with fundamental rights and freedoms. Defining the ambit of these rights and how they interact with one-another in a way that is meaningful and workable requires appreciation of the social context in which these rights are claimed.

To take but one example, social context has helped Canadian courts to grasp the full ambit of the right to equality guaranteed by section 15 of the *Charter*. In its first s. 15 case,<sup>24</sup> the Supreme Court of Canada recognized "substantive discrimination" — discrimination that arises not from inequality on the face of the law, but from when identical sufficiently equal treatment that has a negative effect or impact on a disadvantaged group. Social context allows one to

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<sup>23</sup> *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 43; see also para. 123.

<sup>24</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

understand how rules and programs which may appear quite unobjectionable from a majoritarian perspective actually, in their impact, perpetuate disadvantage through prejudice or stereotyping.

Appreciating social context can also be important in statutory interpretation. A recent decision of my Court regarding the sentencing of Aboriginal offenders offers a good example. The case is known as *Ipeelee* and involved two Aboriginal men with a history of serious offences. Although they had served their jail sentences and had been released from custody, each was subject to a community supervision order.<sup>25</sup> As a result of minor breaches of alcohol or drug consumption, both men were charged and convicted for breaching their supervision orders, and each received lengthy sentences of imprisonment for the breach. At issue was a provision, added to the Canadian *Criminal Code* by Parliament in 1996, which states that sentencing judges must pay "particular attention to the circumstances of Aboriginal offenders".<sup>26</sup>

Social context formed a crucial component of the Court's majority reasons with respect to both the interpretation and application of the Aboriginal sentencing provision. The majority judgment of Justice Lebel noted that the Aboriginal sentencing provision was aimed at ameliorating "the serious problem of overrepresentation of Aboriginal people in Canadian prisons",<sup>27</sup> resulting from a history of colonialism, displacement and residential schools. In interpreting Parliament's directive, judges may properly take judicial notice of these circumstances and their role in bringing the Aboriginal person before the justice system. The

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<sup>25</sup> *R. v. Ipeelee*, 2012 SCC 13.

<sup>26</sup> Section 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>27</sup> *Ipeelee*, *supra*, par. 59; see also *R. v. Gladue*, [1999] 1 S.C.R. 688.

result is not an automatic sentencing discount, but rather a direction to craft an appropriate sentence which, in all the circumstances, is proportionate to the gravity of the offence and the specific offender's moral blameworthiness.

At the same time, we have learned that judges should be careful not to misuse or overuse social context evidence. Quantities of unfocussed and often contradictory information and expert opinion on social context may obfuscate rather than clarify, and may improperly divert the trial from the law and the facts into the realm of optimum social policy. The judge must always remember that social context is an aid. It complements, but does not supplant, the traditional judicial techniques of statutory construction, reliance on precedent and the weighing of evidence presented through the adversarial system.

The National Judicial Institute — our equivalent to your Judicial Studies Committee — has been instrumental in alerting Canadian judges to the importance of social context and its proper use. Social context, along with skills training and substantive law, constitute the three prongs of every National Judicial Institute educational program.

Considering social context has proved important to ensuring that Canada's judges meet the challenges of judging in a diverse society. It has helped ensure that our laws are interpreted in a way that is responsive to the realities of Canadian society. Perhaps more than any other single measure, it has helped minority and disadvantaged Canadians see the justice system, not

as an elite institution imposing the will of the majority, but as a process that understands their particular reality. In short, as a process that is just and fair.

3. A Diverse Bench

I have spoken of the importance of informed impartiality and social context to judging in a diverse society and maintaining confidence in the judicial system. Important as these are, one more element of meeting this challenge must be mentioned. I refer to the need for diversity on the bench.

Let me begin by noting that the Canadian judiciary— at least from the perspective of gender and ethnicity — is not a particularly diverse group. I suspect that much the same could be said of here in Scotland. A majority of Canadian judges — about 68% — are men. While Canadian judges belong to various religions and linguistic groups, we are very largely Caucasian. We have made progress — to have women as a third of our judges and holding four of nine places on the Supreme Court of Canada is no mean accomplishment. But we could do better. The same applies to social minorities. If we are to fully meet the challenges of judging in a diverse society, we must work toward a bench that better mirrors the people it judges.

Diversity within the judiciary is important for two reasons. First, like understanding social context, diversity on the bench is a useful way to bring different and important points of



view and perspectives to judging. Second, a diverse bench that reflects the society it serves enhances public confidence in the justice system. Let me briefly explore each of these points.

A diverse bench brings different and valuable perspectives to the decision-making process. This enriches the judging process and may lead to better decisions. Regardless of gender, race or background, judges must be capable of making fair decisions for women and members of minority communities. And they do. Still, my personal experience has led me to the conviction that women on the bench do make a difference. I have seen deliberations take a new turn because of the perspective brought by a woman to an issue involving a woman. And I have seen court culture change as the number of women on a court moves from one, to three, to four.

A near majority of Canadian jurisprudence has acknowledged the difference diversity makes.

*R. v. Lavallée*<sup>28</sup> demonstrates how the perspective of women judges can improve an area of the law developed under a uniquely male paradigm. Ms. Lavallée shot her common-law spouse in the back as he was leaving the room. She was charged with murder. Her defense was a difficult one — self-defense. It was clear that Ms. Lavallée was not in immediate peril as the law had traditionally defined it; she could have retreated and left the room. The trial judge allowed evidence of “battered woman syndrome” to go to the jury, in support of Ms. Lavallée’s

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<sup>28</sup> *R. v. Lavallee*, [1990] 1 S.C.R. 852.

defense that she believed that if she did not shoot her spouse as he was leaving the room he would have killed her. The jury acquitted. The issue on appeal was whether this evidence was properly admitted. The majority held it was. Justice Bertha Wilson penned this eloquent defense of the importance of understanding the female perspective.

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".

Another case that illustrates the importance of minority judicial perspectives — this time relating to race — is *R.D.S.*<sup>29</sup>

The accused, a 15 year old black youth, was charged with assaulting a police officer and resisting arrest in an altercation involving a number of young black people and police in Halifax, Nova Scotia. The judge, a black woman, acquitted the accused on the basis that the officer's testimony had left her with a reasonable doubt, noting in passing that the police had been known to overreact and mislead when dealing with non-white groups.

The issue on appeal was whether this showed bias. The Supreme Court rejected this argument, holding that the judge, as a member of the community, was entitled "to take into

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<sup>29</sup> *R. v. S. (R.D.), supra.*

account the well-known presence of racism in that community and to evaluate the evidence of what occurred against that background".<sup>30</sup>

I have been arguing that diversity on the bench is important so that the perspectives of women and minorities inform the judicial process. But there is a second reason for a diverse bench in a diverse society — to foster public confidence in the administration of justice. Let me be clear, I am not advocating quotas of judges advocating for specific communities. I am making the broader point that there is value in people seeing a bench that includes at least some people "like them". Representativeness in this sense is about ensuring that the public sees itself reflected in the judiciary. It is about legitimacy and public confidence.

Let me tell you a story of an experience I had as a trial judge, which may bring home to you the importance of a representative bench. One slow afternoon, I was asked to take a family property division case. The wife's counsel was female. The court reporter was female. The court clerk was female. The only male in the room was the husband, representing himself. We heard the wife's case first. I then turned to the husband and invited him to make submissions. He seemed to be having trouble rising to his feet. I repeated my invitation, reassuring him that he need not be nervous; we simply needed to have his side of the story and his evidence in order to make a just decision. Finally, he struggled to his feet. With a look of umbrage, he said: "Frankly, your Honor, I feel a little outnumbered."

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<sup>30</sup> *R. v. S. (R.D.)*, *supra*, par. 56.

I assured him that he needs have no concern because he was the only man in the courtroom; we would do justice, and he would not be prejudiced by his gender. He proceeded to present his side of the case, and in the end, I divided the property 50-50, as the law required. It is only when I went home later that evening that the thought struck me: how many times, for how many decades, had women stood before all-male tribunals with all-male lawyers at counsel table and in the body of the courtroom — if they had the courage to even enter them — and felt more than “a little outnumbered”? How many Aboriginal Canadians and other members of minority communities brought before an austere and perhaps alien justice system would have similarly felt “a little outnumbered”?

The reality, to which I earlier alluded, is that many people, particularly women and visible minorities, may have less than complete trust in a system composed exclusively or predominantly of middle-aged white men in pinstriped trousers. They will question whether such a court can reflect the various viewpoints and values of an increasingly pluralistic society. It may be impossible to have the bench that perfectly mirrors society in all its diversity. But if great segments of the population are excluded or represented only by the occasional token judge, public confidence in the administration of justice may suffer. Women and minorities, like the gentleman in my story, may feel unwelcome and outnumbered in the courtroom — a space where no one should feel excluded on account of gender or background. Diversity on the bench can only enhance the credibility of our justice systems and the repute of the administration of justice.

The path to a diverse judiciary that reflects women and minority groups is difficult. While several thousand people have made it to the summit of Mount Everest, not one pluralist country to my knowledge has achieved a bench that adequately reflects its diversity. How can this be remedied?

I am not an expert, and each country must find its own path to diversity on the Bench. But it seems to me that two things can help — an open gateway and a fair merit-based selection process.

By open gateway I mean the ability of anyone who meets minimal requirements to be a judge, to apply. But I also mean a process that does not inadvertently narrow the pool from which potential judges are drawn by assuming that only those with a particular background for example, a distinguished career at the bar may apply. Our experience in Canada suggests that lawyers with a variety of pre-judicial experiences can make excellent judges.

By a fair merit-based process I mean a process that evaluates merit by asking the question: what is required to be a good judge? Merit has often been defined to reflect a very traditional ideal of excellence in the practice of law, specifically litigation. Unfortunately, this principle, although intended to identify the best candidates for appointment, has frequently operated to exclude qualified women and members of minority groups from the bench. If merit is defined restrictively to exclude all those but senior litigators with a dossier of high profile

cases and clients, if merit is defined as excluding the special perspectives that women and members of minority communities can bring to the Bench, we will never reach the summit of this particular Everest.

We should remind ourselves of what psychologists have documented — human beings see “merit” in those who exhibit the same qualities that they possess. To put it in terms averted to earlier, we tend to apply System 1 thinking to the appointment process without fully engaging System 2 analysis. Senior lawyers and judges are no exception. When they look for merit, they tend to automatically look for someone like themselves. That is their instinctive response. The result is in the appointment of individuals with a traditional practice and profile — male, Q.C., an all-round decent chap. Those who have excelled in non-mainstream legal work, often women and members of minority groups, tend to be excluded from appointment. That’s System 1 thinking: System 2 thinking tells us that a variety of career paths can prepare one for a judicial career, and that a different perspective may be a factor in establishing merit.

Let me be clear. We should only appoint people of merit. We must never compromise on the quality of the judges we appoint. But merit must be understood in the sense of ability to do the job and in full appreciation of the diverse perspectives and legitimacy that judges from diverse backgrounds bring to the bench. When we understand merit in this way, we open the door to appointing women and minorities and to building a judiciary that is a more accurate reflection of the society it serves.

D. CONCLUSION

Allow me to conclude. I have spoken of the challenges of judging in a diverse society. I have mentioned how we can better meet these challenges by cultivating an informed approach to impartiality in the face of difference, an appreciation of the insight that social context offers, and diversity on the bench.

Responding to the challenges of judging a diverse society requires effort. But, in the end, there can be nothing more rewarding for a judge. Judges are asked to grapple with difficult, complex and fascinating issues — issues that can have a profound impact on people's lives and that go to the very nature of our society. And judges are tasked with serving the community by doing justice and preserving the rule of law. To do these things well, judges must respond to the challenges of diversity.

I thank you for your attention.

END

s.21(1)(a)

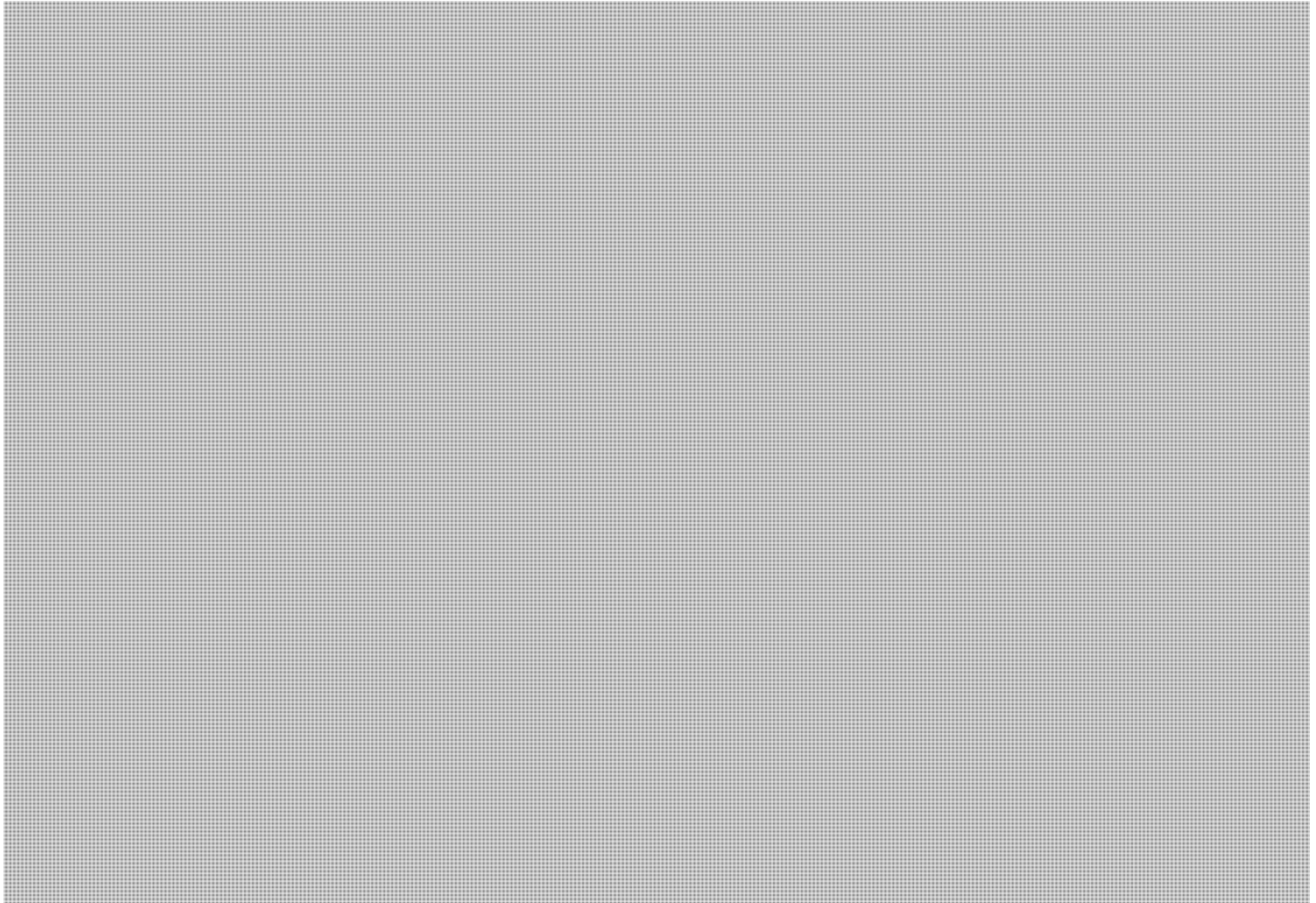
s.21(1)(b)

**Roy, Brigitte**

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**From:** Zaluski, Stephen  
**Sent:** July 29, 2016 1:44 PM  
**To:** Marshman, Nigel  
**Cc:** Pentney, William; Legault, Pierre; Lafleur, Eric; Leclerc, Caroline; Shanks, Jonathan; Harris, Randall; Taschereau, Alexia  
**Subject:** [REDACTED]

Hi Nigel –



Thanks,

S

**Stephen Zaluski**

Director, Judicial Affairs / Public Law and Legislative Services Sector  
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**From:** Zaluski, Stephen  
**Sent:** July 28, 2016 6:00 PM  
**To:** [REDACTED]@justice.gc.ca>  
**Cc:** Lafleur, Eric <Eric.Lafleur@justice.gc.ca>; Leclerc, Caroline <Caroline.Leclerc@justice.gc.ca>; Shanks, Jonathan <Jonathan.Shanks@justice.gc.ca>  
**Subject:** FW: SCC: TPs for Minister  
**Importance:** High

Dear [REDACTED]

Please find attached Talking Points that we have prepared for the Minister's use for her calls with the Chief Justice and the Atlantic Attorneys General.

Please note that the Deputy Minister and his office have not yet had a chance to review them, and may have comments tomorrow, but wanted to ensure you received them in the meantime. We'll let you know if there are any further adjustments following the Deputy's review.

As well, we will follow up tomorrow with additional Talking Points for the calls with Opposition Justice critics.

Please let us know if there are other materials you need to support the Minister in advance of the announcement on Tuesday.

Thanks,

**Stephen Zaluski**

Director, Judicial Affairs / Public Law and Legislative Services Sector  
Department of Justice, Government of Canada  
[stephen.zaluski@justice.gc.ca](mailto:stephen.zaluski@justice.gc.ca) / Tel: 613-948-2086

Directeur, Service des affaires judiciaires / Secteur du droit public et des services législatifs  
Ministère de la Justice / Gouvernement du Canada  
[stephen.zaluski@justice.gc.ca](mailto:stephen.zaluski@justice.gc.ca) / Tél. : 613-948-2086

<< File: TPs for call with CJ-July28.docx >> << File: TPs for MOJ call to Atlantic AGs-July28.docx >>

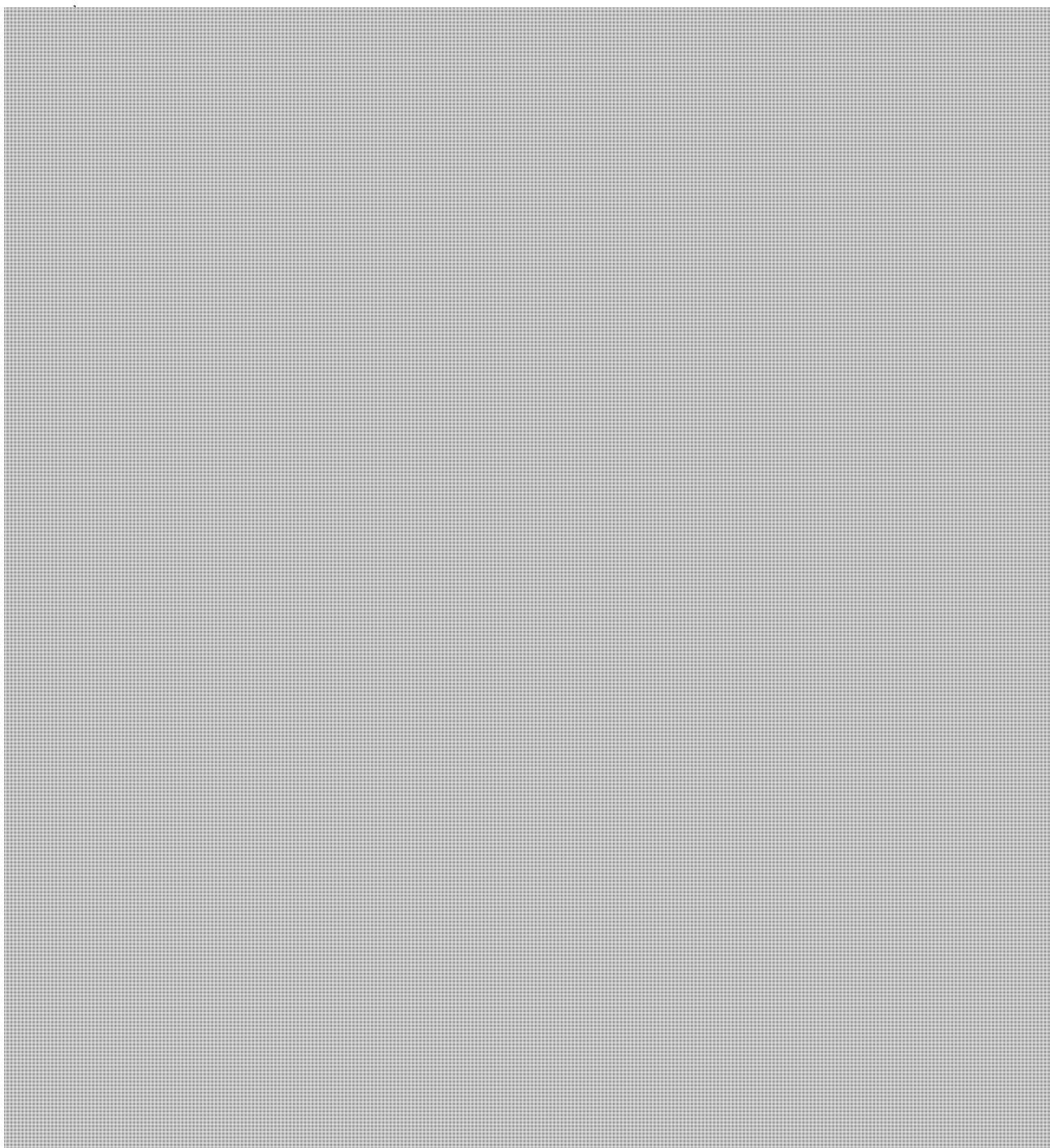


Protected B  
2016-

# **Talking Points**

## **Call to Chief Justice McLachlin:**

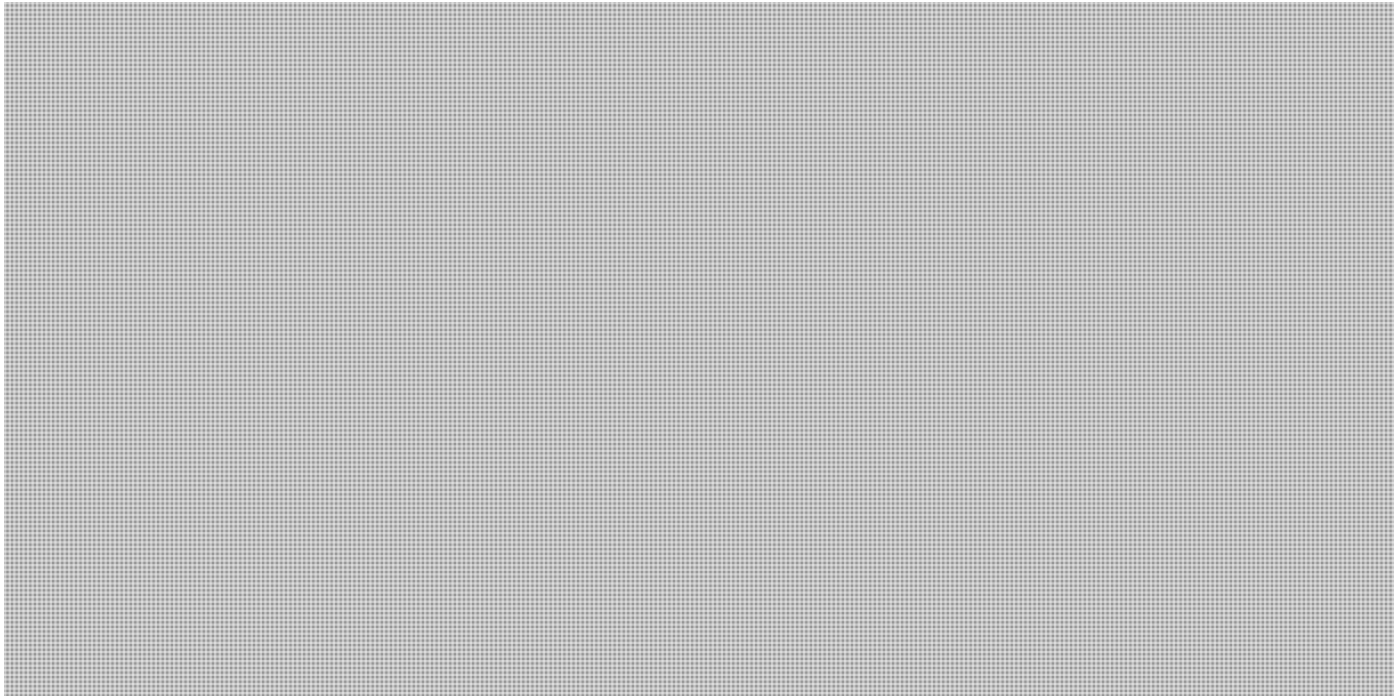
### **Supreme Court of Canada Appointments Process**



**Pages 212 to / à 214  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**21(1)(a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



**PREPARED BY**  
Randall Harris  
Counsel, Judicial Affairs  
Public Law and Legislative Services Sector  
613-941-4147

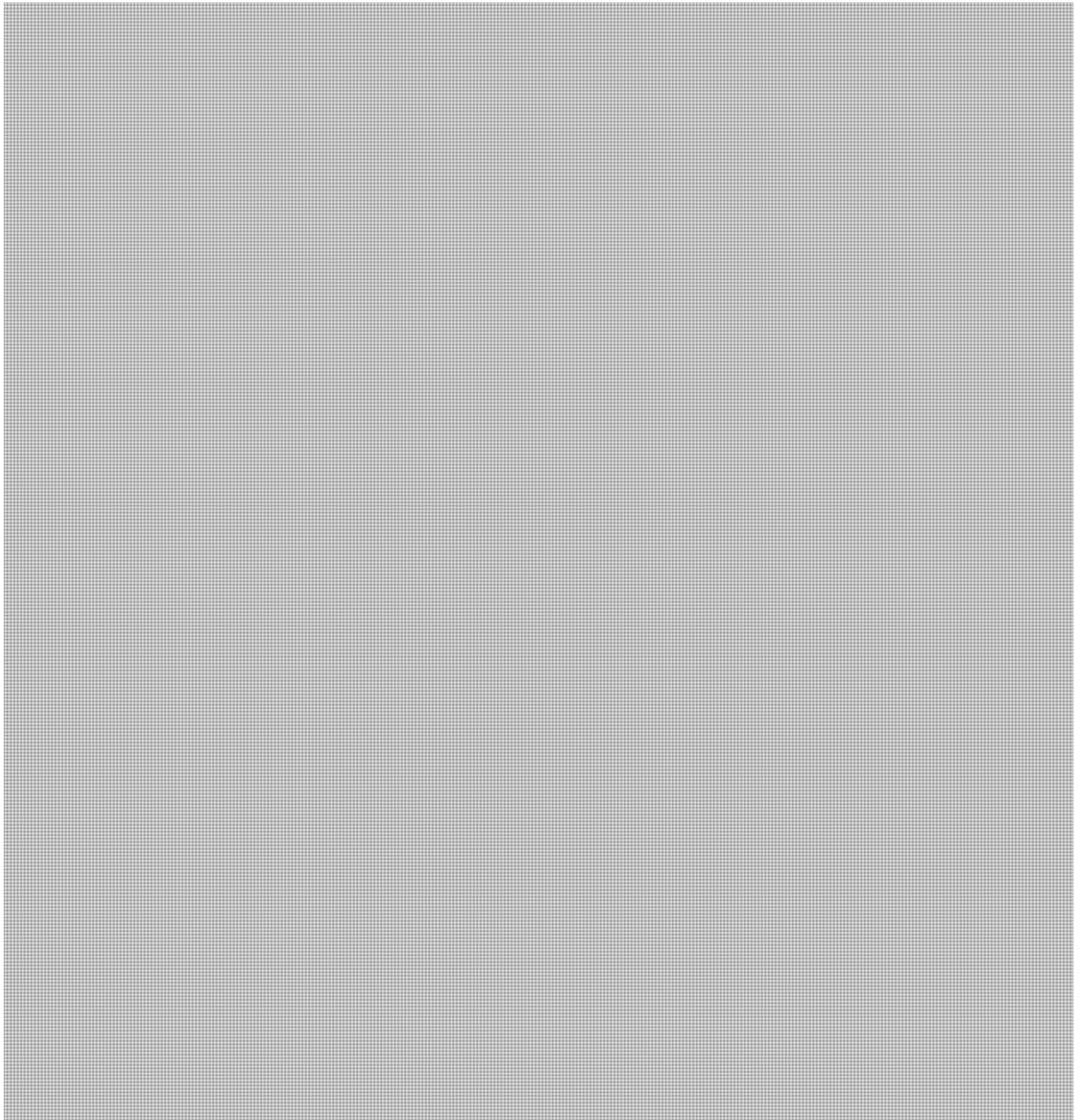
**s.21(1)(a)**



s.21(1)(a)

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2016-

## **Talking Points Call to Atlantic Canada Attorneys General: Supreme Court of Canada Appointments Process**

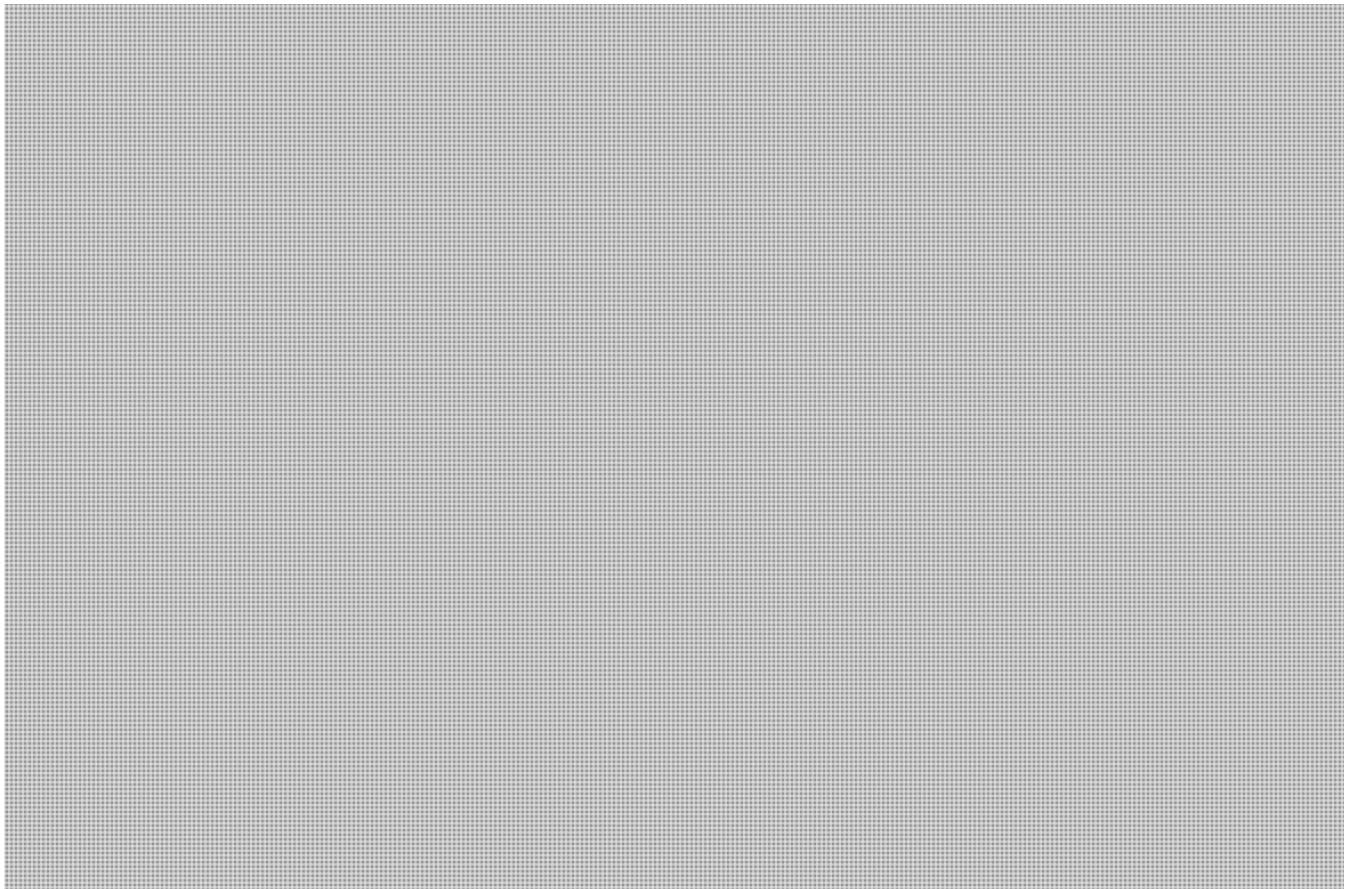


**Pages 217 to / à 219  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**21(1)(a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

s.21(1)(a)



**PREPARED BY**  
Randall Harris  
Counsel, Judicial Affairs  
Public Law and Legislative Services Sector  
613-941-4147

**Roy, Brigitte**

---

**From:** Zaluski, Stephen  
**Sent:** July 29, 2016 4:19 PM  
**To:** [REDACTED]  
**Cc:** Pentney, William; Legault, Pierre; Leclerc, Caroline; Patry, Claudine; Taschereau, Alexia; Livingstone, Edward; Shanks, Jonathan; Butcher, Nicole; Harris, Randall; Lafleur, Eric  
**Subject:** [REDACTED] s.19(1) s.21(1)(b)  
**Importance:** High

Hi Nigel –



Thanks,

S

**Stephen Zaluski**

Director, Judicial Affairs / Public Law and Legislative Services Sector  
Department of Justice, Government of Canada  
[stephen.zaluski@justice.gc.ca](mailto:stephen.zaluski@justice.gc.ca) / Tel: 613-948-2086

Directeur, Service des affaires judiciaires / Secteur du droit public et des services législatifs  
Ministère de la Justice / Gouvernement du Canada  
[stephen.zaluski@justice.gc.ca](mailto:stephen.zaluski@justice.gc.ca) / Tél. : 613-948-2086

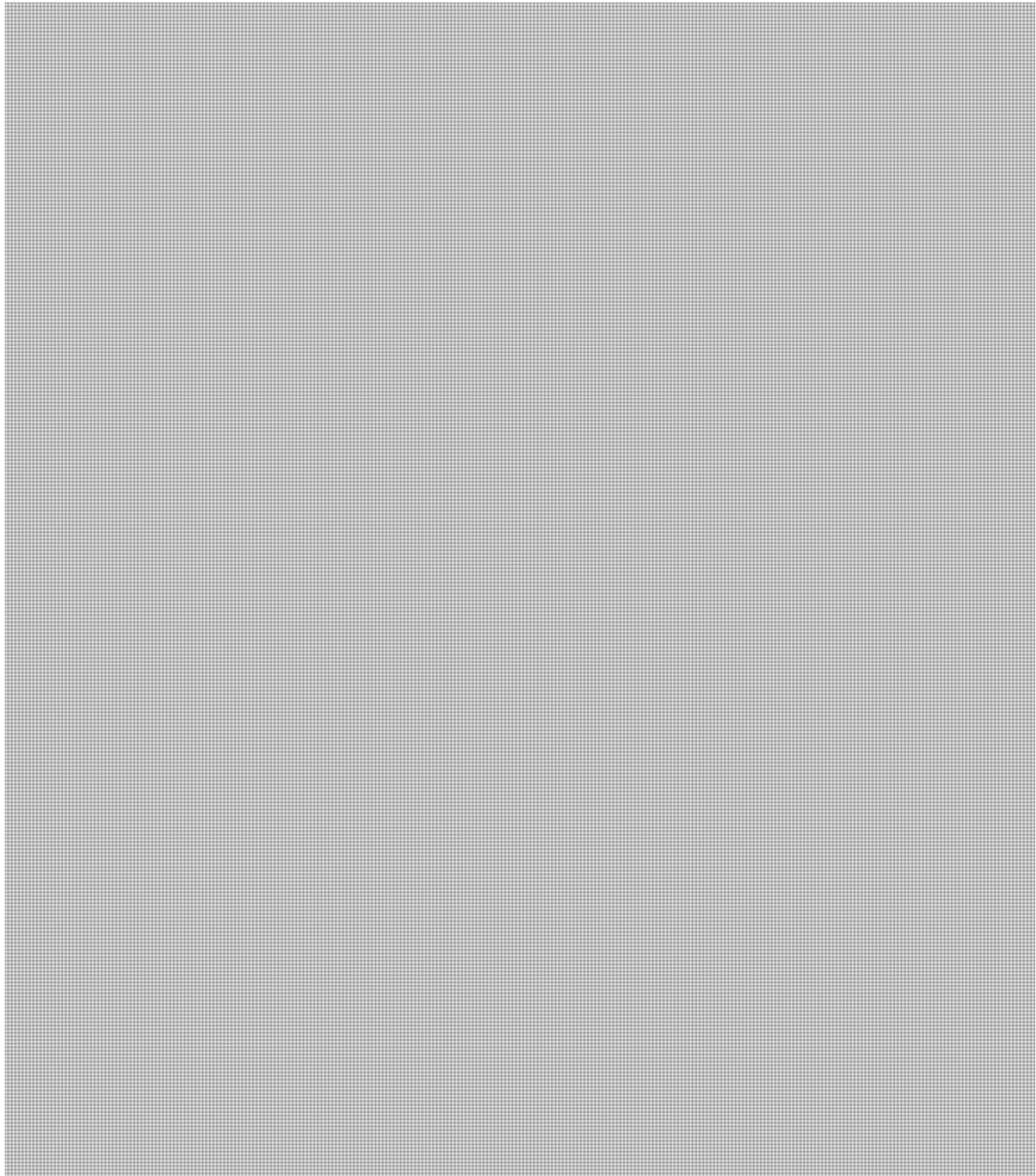




s.21(1)(a)

Protected B  
2016-

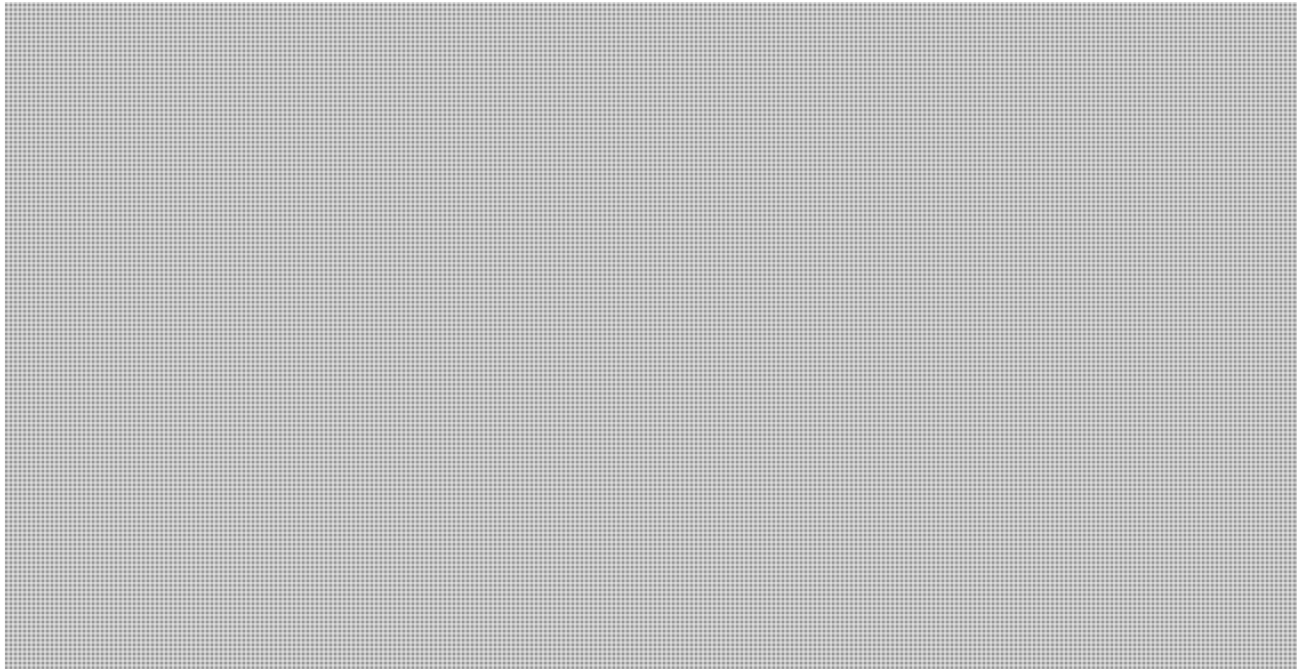
# **Talking Points Call to Justice Critics: Supreme Court of Canada Appointments Process**



**Pages 223 to / à 229  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**21(1)(a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



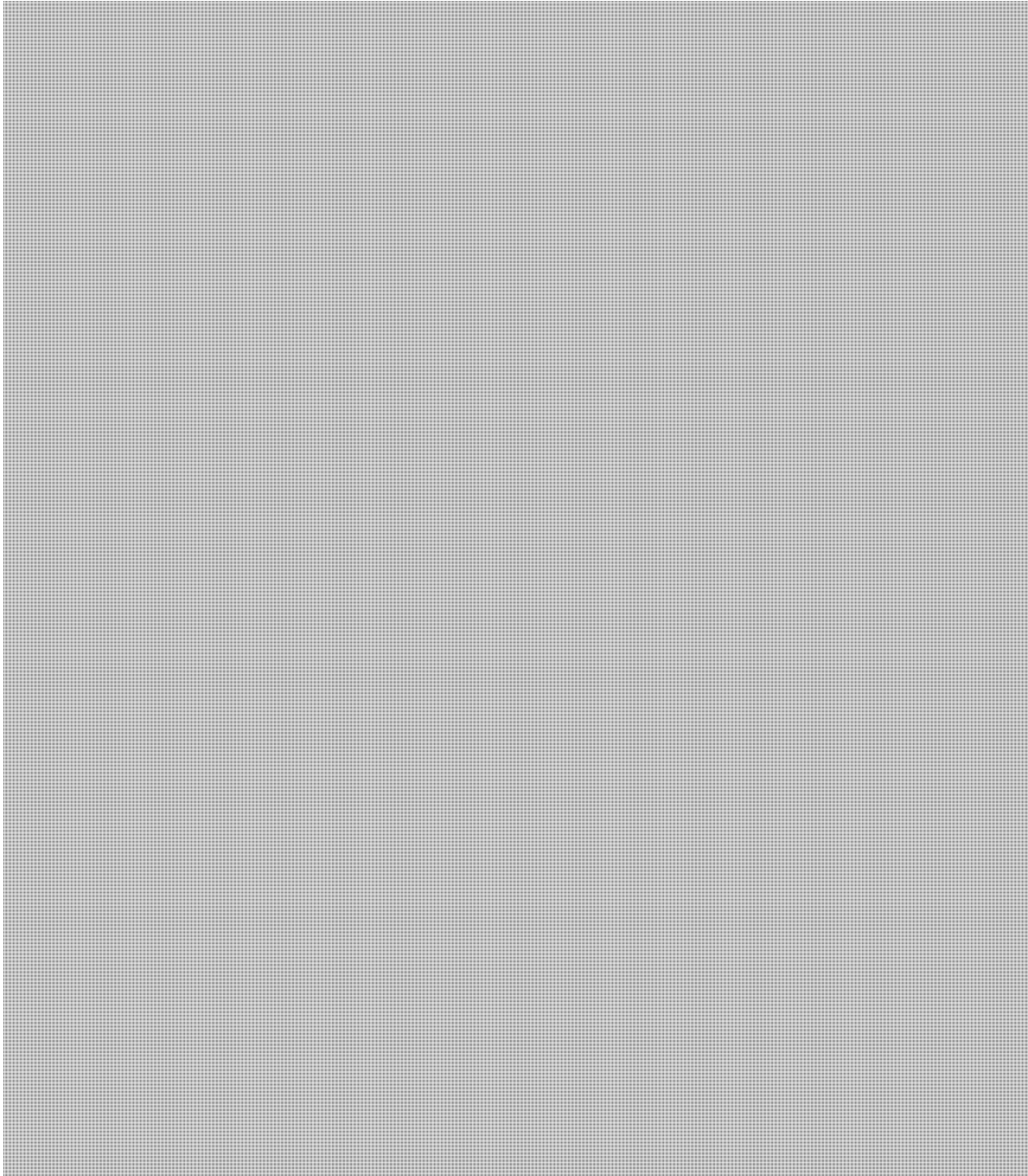
s.21(1)(a)

**PREPARED BY**  
Randall Harris  
Counsel, Judicial Affairs  
Public Law and Legislative Services Sector  
613-941-4147



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2016-

## Functional Bilingualism Responsive Q&As



**Page 232**

**is withheld pursuant to section  
est retenue en vertu de l'article**

**21(1)(a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

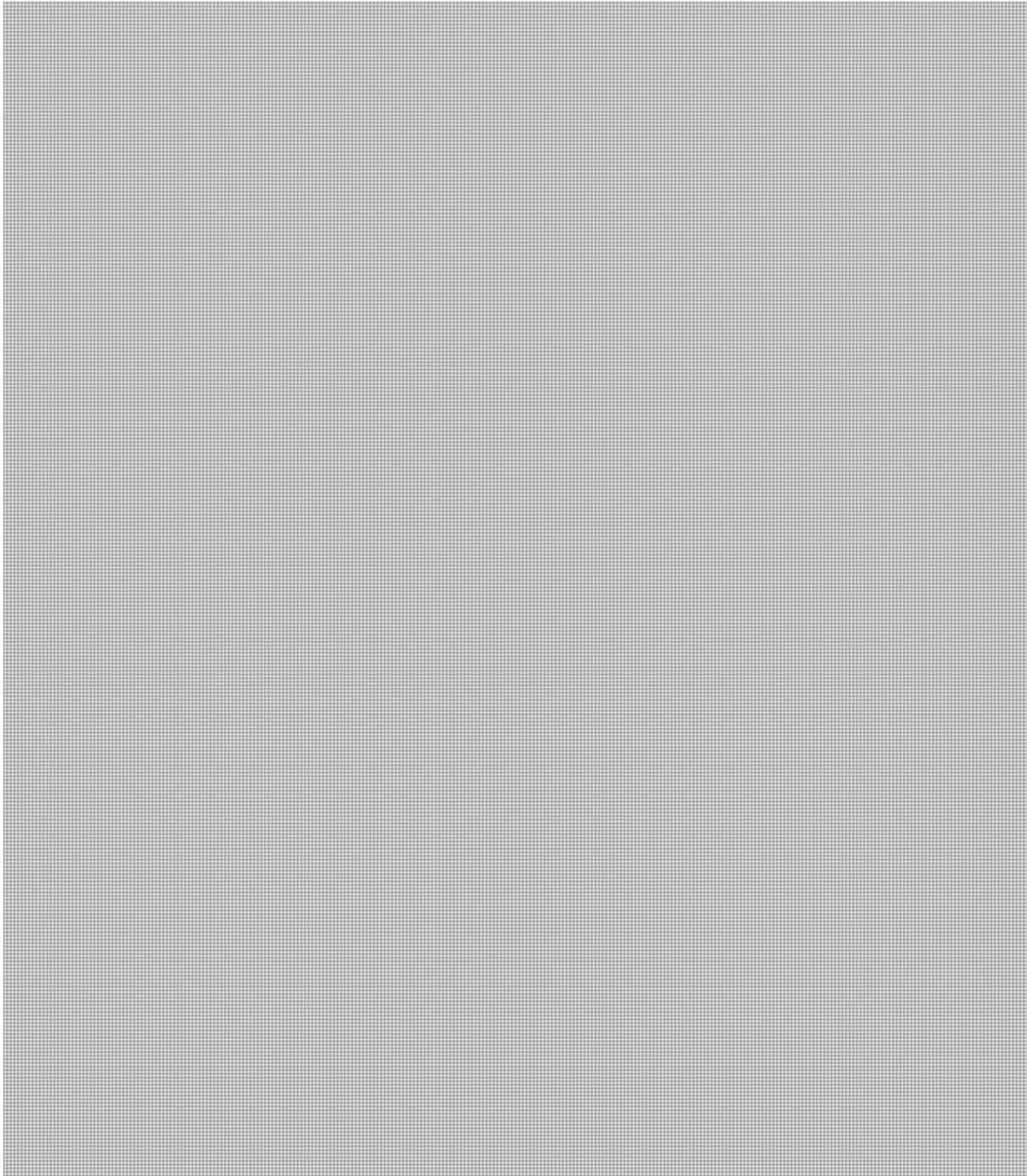


**PREPARED BY**  
Randall Harris  
Judicial Affairs  
Public Law and Legislative Services Sector  
613-941-4147

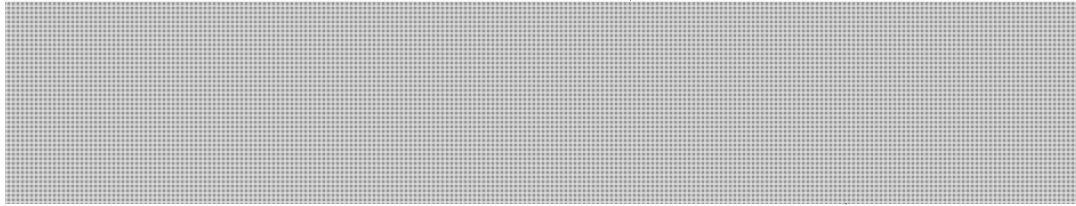


Protected B  
2016-

## Indigenous Appointment Responsive Q&As



s.21(1)(a)



**PREPARED BY**  
Stephen Zaluski  
Director, Judicial Affairs  
Public Law and Legislative Services Sector  
613-948-2086



## MCU / UCM

### Ministerial Correspondence Unit / Unité de la correspondance ministérielle Routing Slip / Feuille de contrôle

Document Date / Date du document: 2016-07-25  
Date of Receipt / Reçu le: 2016-08-02

MCU # / # UCM: 2016-016911

Author / Mr. Murray Rankin VIP  
Auteur: MP, Victoria

House of Commons

Ottawa ON K1A 0A6

Doc Type / Type de Doc: D

Subject / Sujet: 190001  
Judges - General

Due Date / Date d'échéance: 2016-08-24

Sector's Due Date / Date d'échéance du secteur:

Assigned To / Assigné à: MCUED8

Assigned Date / Assigné le: 2016-08-03

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signed on / signée le

Comments / Remarques:

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remarques)
- I: ☐ For your information (no action required) / À titre d'information (aucune mesure requise)

CC: L. MacKenzie

CC: Minister

CC: C. Leclerc

CC: A. Taschereau

CC: J. Ghiz

CC: S. Saville

CC: C. Patry

CC: A. Garskey

CC: L. Wright/S. Zaluski

CC: Y. Legault

CC: J. Gauthier/C. Gagné

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D16-016911  
MCUED8

*Ottawa*

Room 524, Confederation Building  
Ottawa, Ontario K1A 0A6  
Tel.: 613-996-2358  
Fax.: 613-952-1458



HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
CANADA

*Ottawa*

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Tél. : 613-996-2358  
Télé. : 613-952-1458

190001

*Constituency*

1057 Fort Street  
Victoria, British Columbia V8V 3K5  
Tel.: 250-363-3600  
Fax.: 250-363-8422

*Murray Rankin*  
Member of Parliament / Député  
Victoria

*Circconscription*

1057, rue Fort  
Victoria (Colombie-Britannique) V8V 3K5  
Tél. : 250-363-3600  
Télé. : 250-363-8422

Hon. Minister Jody Wilson-Raybould, MP  
Minister of Justice  
House of Commons  
Ottawa

July 25, 2016

Re: Supreme Court of Canada Appointment Process

Dear Minister,

I am writing in my capacity as the Justice Critic for the New Democratic Party. During the election campaign, the Liberal platform promised greater transparency, greater accountability and greater public involvement in the Supreme Court appointment process.

It has been reported that your government has tasked a cabinet committee to generate a short list of candidates for appointment to the Supreme Court of Canada in order to fill the vacancy left by the retirement of Mr. Justice Cromwell, which becomes effective September 1 of this year. It is also been reported that you are considering whether to allow individuals to nominate themselves as to the highest court of the land, although it is unclear how this process will impact the closed-door consultations already apparently underway.

To date there has been no reference to any role that parliamentarians will be called upon to play in the process. Particularly given the urgency of having an appointment in place before the Supreme Court's fall session begins, your government's ability to implement this kind of open and transparent process seems severely compromised.

For example, I can confirm that no one in our party has been approached on this matter. Given the importance of the Supreme Court as a national institution, we would have expected that other parties would be consulted on the appointment process and on its implementation to address the upcoming vacancy, and that opposition members would be asked to participate in an advisory committee similar to what was established by previous Liberal and Conservative governments. In the past, members have

been asked to provide names of qualified candidates and also to serve on the kind of committee of parliamentarians that would be called upon to publicly interview the finalist. To date we have heard nothing whatsoever in this regard.

You will recall that as far back as 2005, former Liberal Justice Minister Irwin Cotler introduced a four-step appointment process which involved parliamentarians. This reflects a recognition that Supreme Court appointments are most credible when they flow from a meaningful, non-partisan consultation process that includes Parliament and the provinces, and that strives for greater inclusiveness.

We are hopeful that your government will not abandon this important element of transparency and collaboration when it comes to appointments to the highest court in the land.

We await your reply.

Yours truly,



s.19(1)

Murray Rankin  
MP (Victoria) and critic for Justice and the Attorney General

**To:** Ministerial Correspondence Unit - Justice Canada[mcu@justice.gc.ca]  
**Cc:** PLLSS Tracking SDPSL[PLLSS\_Tracking\_SDPSL@justice.gc.ca]; Crosby, Adair[Adair.Crosby@justice.gc.ca]; Roy, Brigitte[Brigitte.Roy@justice.gc.ca]; Zaluski, Stephen[Stephen.Zaluski@justice.gc.ca]  
**Subject:** JACTP\_2016-016911\_SCC\_APP\_Proc\_Transparency YD-VIP  
**Sent:** Mon 8/22/2016 6:40:03 PM  
**From:** PLLSS Tracking SDPSL

JACTP 2016-016911 SCC APP Proc Transparency FIN.pdf  
JACTP 2016-016911 SCC APP Proc Transparency LETTER.docx

Good afternoon,

Please find attached the PLLSS ADM approved e-version for the above noted Yellow Docket for action. The hard copy will be brought to you shortly.

Thank you,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector

Department of Justice Canada / Government of Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs

Ministère de la Justice Canada / Gouvernement du Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tél : 613-941-7888

## MCU / UCM

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Document Date / Date du document: 2016-08-10  
Date of Receipt / Reçu le: 2016-08-10

MCU # / # UCM: 2016-017643

Author / Ms. Janet M. Fuhrer VIP  
Auteur: President

Doc Type / Type de Doc: A

The Canadian Bar Association  
500-865 Carling Avenue  
Ottawa ON K1S 5S8

Subject / Sujet: 230002  
Canadian Bar Association

Due Date / Date d'échéance: 2016-08-04

president@cba.org

Sector's Due Date / Date d'échéance du secteur:

Assigned To / Assigné à: MCURLL  
MCUED5

Assigned Date / Assigné le: 2016-08-12

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- ☐ Modified standard reply / lettre type modifiée
- ☐ Based on letter / Basée sur la lettre  
signed on / signée le \_\_\_\_\_

#### Comments / Remarques:

c/w D16-015839

#### INSTRUCTIONS

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- F: ☐ Action at your discretion / Donner suite à votre discrétion
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- I: ☐ For your information (no action required) / À titre d'information (aucune mesure requise)

CC: L. MacKenzie  
CC: S. Saville  
CC: J. Gauthier

CC: Minister  
CC: A. Taschereau/A.  
Garskey  
CC: C. Gagné

CC: C. Leclerc/C. Patry  
CC: T. Nesrallah  
CC:

CC: L. Wright/S. Zaluski  
CC: M. Ross/PS-SADM

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THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

Office of the President  
Cabinet de la présidente

A16-017643  
MCURLL/MCUEDS

230002

q/w D16-015839

August 10, 2016

Via email: [justin.trudeau@parl.gc.ca](mailto:justin.trudeau@parl.gc.ca); [mcu@justice.gc.ca](mailto:mcu@justice.gc.ca)

The Right Honourable Justin Trudeau, P.C., M.P.  
Prime Minister  
Langevin Building  
80 Wellington Street  
Ottawa, ON K1A 0A2

The Honourable Jody Wilson-Raybould, P.C., M.P.  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8

Dear Prime Minister and Minister of Justice:

**Re: Supreme Court of Canada Appointments**

In recent days there has been commentary about the selection criteria for appointment to the Supreme Court of Canada, including perceptions that the government has signaled a departure from the longstanding custom or constitutional convention of regional representation on the Court, by inviting applications from across Canada to fill the vacancy occasioned by the retirement of Justice Cromwell of Nova Scotia. I am writing to urge the government to ensure that the membership of Canada's highest court embraces all aspects of Canada's diversity, including respect for that custom or convention.

Canada is a large and varied country, with a strong commitment to an independent and impartial judiciary, multiple legal traditions and strong values. The Canadian Bar Association firmly believes that appointments to the Supreme Court of Canada should be based on merit, ensuring that our judiciary reflects the full diversity of our regions, legal systems and population.

Our highest court must continue to represent all regions of Canada, including Atlantic Canada. Consequently, we urge you to amend the mandate of the Advisory Board outlined in your August 4, 2016 letter, to ensure that the Atlantic Canada vacancy is filled by a meritorious candidate from that region. We also urge you to honour regional representation in filling future vacancies on Canada's highest court.

The CBA welcomes selection processes that are accessible and transparent and that genuinely open the doors to more candidates, not just for the Supreme Court of Canada, but for all courts. It is only through such processes that Canadians will have confidence that the best candidates have been considered.

The CBA further encourages the government to consult with provincial and territorial attorneys general, chief justices and the bar to ensure that opportunities are identified to encourage the full participation in the selection process of qualified candidates from regions and communities.

Yours truly,



s.19(1)

Janet M. Fuhrer



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

Office of the President  
Cabinet de la présidente

Le 10 août 2016

[TRADUCTION]

Par courriel : [justin.trudeau@parl.gc.ca](mailto:justin.trudeau@parl.gc.ca); [mcu@justice.gc.ca](mailto:mcu@justice.gc.ca)

Le très honorable Justin Trudeau, C.P., député  
Premier ministre  
Édifice Langevin  
80, rue Wellington  
Ottawa (Ontario) K1A 0A2

La très honorable Jody Wilson-Raybould, C.P., députée  
Ministre de la Justice et procureure générale du Canada  
284, rue Wellington  
Ottawa (Ontario) K1A 0H8

Monsieur le Premier Ministre,  
Madame la Ministre,

**Objet : Nominations à la Cour suprême du Canada**

Au fil des derniers jours, les critères de sélection pour la nomination à la Cour suprême du Canada ont fait l'objet de nombreux commentaires. Certains font état d'impressions que le gouvernement, en sollicitant des candidatures auprès de juristes de tout le pays afin de pourvoir le poste qui sera laissé vacant par le juge Cromwell, de la Nouvelle-Écosse, lors de son départ à la retraite, s'est éloigné de la longue tradition ou convention constitutionnelle visant à garantir une représentation régionale à la Cour. Je vous écris pour exhorter le gouvernement à veiller à ce que les membres de la plus haute cour du Canada reflètent tous les aspects de la diversité canadienne, et à respecter cette tradition ou convention.

Le Canada est un vaste et divers pays solidement engagé envers l'indépendance et l'impartialité de la magistrature, et doté de multiples traditions juridiques ainsi que de solides valeurs. L'Association du Barreau canadien (ABC) est convaincue que les nominations à la Cour suprême du Canada devraient être fondées sur le mérite, veillant à ce que les juges reflètent l'intégralité de la diversité de nos régions, de nos régimes juridiques et de notre population.

Notre plus haute cour doit continuer à représenter toutes les régions du Canada, y compris celles de l'Atlantique. Par conséquent, nous vous exhortons à modifier le mandat du comité consultatif énoncé



dans votre lettre du 4 août 2016, afin de garantir que le poste vacant des provinces de l'Atlantique sera offert à un candidat ou à une candidate méritoire de cette région du Canada. Nous vous exhortons en outre à honorer la représentation régionale lors de la dotation ultérieure de postes vacants à la Cour suprême.

L'ABC réserve un accueil favorable aux processus de sélection accessibles et transparents réellement ouverts à un plus grand nombre de candidats et de candidates, non seulement s'agissant de la Cour suprême du Canada, mais de tous les autres tribunaux. Ce n'est que grâce à ce genre de processus que la population de ce pays pourra être convaincue que seules les meilleures candidatures ont été examinées.

L'ABC encourage, par ailleurs, le gouvernement à consulter les procureurs généraux et juges en chef des provinces et territoires, ainsi que les membres du barreau, pour s'assurer de la reconnaissance des occasions d'encourager une participation au processus de sélection par les candidats et candidates qualifiés des régions et communautés qui soit pleine et entière.

Je vous prie d'agréer, Monsieur le Premier Ministre, Madame la Ministre, l'expression de ma haute considération.



s.19(1)

Janet M. Fuhrer

## Ministerial Correspondence Unit - Justice Canada

---

**From:** [REDACTED]@CBA.org> on behalf of CBA President / Présidente  
de l'ABC <president@cba.org>  
**Sent:** August-10-16 2:14 PM  
**To:** 'justin.trudeau@parl.gc.ca'; Ministerial Correspondence Unit - Justice Canada  
**Subject:** Supreme Court of Canada Appointments  
**Attachments:** 16-46-eng.pdf; 16-46-fr.pdf s.19(1)

Dear Prime Minister and Minister of Justice:

Please see the attached letter from the President of the Canadian Bar Association.

Kind regards,

**Janet M. Fuhrer**  
President/Présidente  
Canadian Bar Association/L'Association du Barreau canadien  
500-865 Carling Avenue Ottawa, ON K1S 5S8  
Phone: 1-800-267-8860  
Fax: (613) 237-0185

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**To:** Fares, Patricia[Patricia.Fares@justice.gc.ca]  
**Subject:** FW: 2016-017643  
**Sent:** Thur 8/18/2016 2:36:36 PM  
**From:** Ministerial Correspondence Unit - Justice Canada

16-017643 incoming(1).pdf

For your information.

**From:** Desbiens, Alex  
**Sent:** August-18-16 10:21 AM  
**To:** Ministerial Correspondence Unit - Justice Canada  
**Cc:** Crosby, Adair; Roy, Brigitte; Zaluski, Stephen  
**Subject:** 2016-017643

Good morning,

We will be answering to this MCU letter separately from 2016-0015839. Can you please send us a yellow docket with due dates.

Thank you very much,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector

Department of Justice Canada / Government of Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs

Ministère de la Justice Canada / Gouvernement du Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tél : 613-941-7888

**To:** Ministerial Correspondence Unit - Justice Canada[mcu@justice.gc.ca]  
**Cc:** PLLSS Tracking SDPSL[PLLSS\_Tracking\_SDPSL@justice.gc.ca]; Crosby, Adair[Adair.Crosby@justice.gc.ca]; Roy, Brigitte[Brigitte.Roy@justice.gc.ca]; Zaluski, Stephen[Stephen.Zaluski@justice.gc.ca]  
**Subject:** JACTP\_2016-017643\_BAR\_SCC\_Appointments (responds to 2016-015839 as well)  
**Sent:** Mon 8/29/2016 4:09:48 PM  
**From:** Desbiens, Alex

JACTP 2016-017643 BAR SCC Appointemnts FIN.pdf  
JACTP 2016-017643 BAR SCC Appointemnts LETTER.docx

Good afternoon,

Please find attached the PLLSS ADM approved e-version for the above noted Yellow docket for action (responds to 2016-015811 as well). The hard copy will be brought to you shortly.

Thank you,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector

Department of Justice Canada / Government of Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs

Ministère de la Justice Canada / Gouvernement du Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tél : 613-941-7888

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Document Date / Date du document: 2016-07-13  
Date of Receipt / Reçu le: 2016-07-13

MCU # / # UCM: 2016-015839

Author / Ms. Janet M. Fuhrer VIP  
Auteur: President

The Canadian Bar Association  
500-865 Carling Avenue  
Ottawa ON K1S 5S8

president@cba.org

Doc Type / Type de Doc: D

Subject / Sujet: 230002  
Canadian Bar Association

Due Date / Date d'échéance: 2016-08-04

Sector's Due Date / Date d'échéance du secteur:

Assigned To / Assigné à: MCUED5

Assigned Date / Assigné le: 2016-07-13

#### FOR MCU USE

##### FOR SIGNATURE OF / POUR LA SIGNATURE DE:

- ☐ Minister / Ministre
- ☐ Minister's Chief of Staff or Assistant / Chef de cabinet ou Adjoint du ministre
- ☐ MCU Manager / Gestionnaire de l'UCM
- ☐ Other (pls indicate) / Autre (veuillez préciser)

#### POUR L'USAGE DE L'UCM

##### INSTRUCTIONS / DIRECTIVES:

- ☐ By email / par courriel
- ☐ By letter / par lettre
- ☐ Enclosure(s) / pièce(s) jointe(s)
- ☐ Courtesy copy (c.c.) / copie conforme (c.c.)
- ☐ Standard reply / lettre type
- ☐ Modified standard reply / lettre type modifiée
- ☐ Based on letter / Basée sur la lettre  
signed on / signée le \_\_\_\_\_

#### Comments / Remarques:

*Summary report att.*

#### INSTRUCTIONS

- D: ☐ Draft response / Faire un projet de réponse
- A: ☐ Further letter to be combined with a previous document (see comments) / Nouvelle lettre à joindre à un document précédent (voir remarques)
- F: ☐ Action at your discretion / Donner suite à votre discrétion
- ☐ Further letter to be combined with a previous document (see comments) / Nouvelle lettre à joindre à un document précédent (voir remarques)
- I: ☐ For your information (no action required) / À titre d'information (aucune mesure requise)

CC: L. Mackenzie / Minister  
CC: C. Patry / C. Leclerc  
CC:

CC: S. Saville / A.  
Taschereau  
CC: S. Zaluski  
CC:

CC: Y. Legault / J. Gauthier  
CC: C. Gagne / T. Nesrallah  
CC:

CC: M. Ross / J. Melanson  
CC:

Closed / Fermé:

File Away / Classé:



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

Office of the President  
Cabinet de la présidente

July 13, 2016

Via email: justin.trudeau@parl.gc.ca; mcu@justice.gc.ca

The Right Honourable Justin Trudeau, P.C., M.P.  
Prime Minister  
Langevin Building  
80 Wellington Street  
Ottawa, ON K1A 0A2

The Honourable Jody Wilson-Raybould, P.C., M.P.  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8

Dear Prime Minister and Minister of Justice:

**Re: Supreme Court of Canada Appointment Process**

The Canadian Bar Association looks forward to the public announcement of a revitalized process for appointments to the Supreme Court of Canada. We share the government's commitment to an open and transparent process designed to ensure that appointments will be based solely on merit, and ultimately representative of the diversity of Canadian society. We appreciate having had the opportunity to participate in discussions about the process and the privilege of having a representative on the appointments advisory committee.

We bring to your attention one concern with the prospective process as we understand it, which is publication of the short list of candidates recommended for appointment. The CBA believes that the short list should remain confidential. This is primarily a matter of respect for the privacy of individuals who put their names forward but who ultimately are not appointed. Furthermore some otherwise highly qualified and desirable candidates may not put their names forward, if the shortlist will be made public, because of apprehensions about the reaction of employers, peers or subordinates or because of an unwillingness to become an object of public speculation. We appreciate that the process itself may invite media commentary about likely candidates or quiet gossip in the legal community, but candidates are better placed to manage their reputations if they are the ones controlling disclosure of this information. There were concerns under the previous appointments

D16-015839

MCUED5

230002

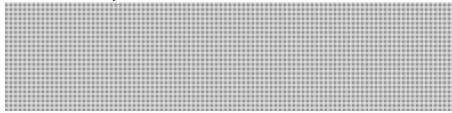
C.C

*Summary rep att*

process about the qualifications of shortlisted candidates, resulting in calls to make the short list public. We believe a more open process from the outset should obviate these concerns, particularly as we understand that appointments will be made from amongst the candidates recommended by the advisory committee.

We would welcome the opportunity to discuss this matter further.

Yours truly,

A rectangular area of the document is redacted with a grey grid pattern, obscuring the signature of Janet M. Fuhrer.

s.19(1)

Janet M. Fuhrer

## **Ministerial Correspondence Unit - Justice Canada**

**From:** [REDACTED]@CBA.org> on behalf of CBA President / Présidente.  
de l'ABC <president@cba.org>  
**Sent:** s.19(1) July-13-16 3:56 PM  
**To:** 'justin.trudeau@parl.gc.ca'; Ministerial Correspondence Unit - Justice Canada  
**Cc:** [REDACTED]'Mathieu.Bouchard@pmo-cpm.gc.ca'; 'Simon.Robertson@pmo-cpm.gc.ca'  
**Subject:** Supreme Court of Canada Appointment Process  
**Attachments:** L160713.pdf

Dear Prime Minister and Minister of Justice:

Please see the attached letter from the President of the Canadian Bar Association.

Kind regards,

**Janet M. Fuhrer**  
President/Présidente  
Canadian Bar Association/L'Association du Barreau canadien  
500-865 Carling Avenue Ottawa, ON K1S 5S8  
Phone: 1-800-267-8860  
Fax: (613) 237-0185

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Si vous souhaitez ne plus recevoir de messages électroniques commerciaux de l'Association du Barreau canadien et de ses divisions provinciales et territoriales ainsi que de l'Association canadienne des conseillers (ères) juridiques d'entreprises, vous pouvez vous désinscrire en tout temps en écrivant à [unsubscribe@cba.org](mailto:unsubscribe@cba.org). Vous pouvez communiquer avec l'Association du Barreau canadien par la poste au 865, avenue Carling, bureau 500, Ottawa, Ontario K1S 5S8, par courriel à [info@cba.org](mailto:info@cba.org) ou par téléphone au 1-800-267-8860. Veuillez noter que certains des messages qu'envoient les employés de l'Association du Barreau canadien ne sont pas des messages électroniques commerciaux.



**To:** [REDACTED] Saville, Suesan[Suesan.Saville@justice.gc.ca]; Leclerc, Caroline[Caroline.Leclerc@justice.gc.ca]; Patry, Claudine[Claudine.Patry@justice.gc.ca]; Taschereau, Alexia[Alexia.Taschereau@justice.gc.ca]; Legault, Yanike[Yanike.Legault@justice.gc.ca]; Gauthier, Julie[Julie.Gauthier@justice.gc.ca]; Gagné, Chantal[Chantal.Gagne@justice.gc.ca]; Butcher, Nicole[Nicole.Butcher@justice.gc.ca]; van Rooijen, Vanessa[Vanessa.vanRooijen@justice.gc.ca]; Desbiens, Alex[Alex.Desbiens@justice.gc.ca]; Melanson, Janice[Janice.Melanson@justice.gc.ca]; Nesrallah, Tania[Tania.Nesrallah@justice.gc.ca]; Ross, Marie[Marie.Ross@justice.gc.ca]; Zaluski, Stephen[Stephen.Zaluski@justice.gc.ca]  
**Subject:** e-cc 16-015839 incoming(1).pdf - VIP (Canadian Bay Association/President)  
**Sent:** Thur 7/14/2016 1:54:32 PM  
**From:** Ministerial Correspondence Unit - Justice Canada

*Attached FOR INFORMATION ONLY is your copy of an incoming ministerial letter.*

-----  
*Ci-joint, vous trouverez copie d'une lettre ministérielle À TITRE INFORMATIF SEULEMENT.*

**Ministerial Correspondence Unit, Department of Justice**

**Unité de la correspondance ministérielle, Ministère de la Justice**

**[mcu@justice.gc.ca](mailto:mcu@justice.gc.ca)**

**To:** Ministerial Correspondence Unit - Justice Canada[mcu@justice.gc.ca]  
**Cc:** Shanks, Jonathan[Jonathan.Shanks@justice.gc.ca]; Butcher, Nicole[Nicole.Butcher@justice.gc.ca]; van Rooijen, Vanessa[Vanessa.vanRooijen@justice.gc.ca]; Crosby, Adair[Adair.Crosby@justice.gc.ca]; Roy, Brigitte[Brigitte.Roy@justice.gc.ca]; Zaluski, Stephen[Stephen.Zaluski@justice.gc.ca]  
**Subject:** JACTP\_2016-015839\_CBA\_SCC\_App\_Proc  
**Sent:** Mon 7/25/2016 8:16:57 PM  
**From:** Desbiens, Alex

JACTP 2016-015839 CBA SCC App Proc LETTER.docx  
JACTP 2016-015839 CBA SCC App Proc FIN.pdf

Good afternoon,

Please find attached the PLLSS a/ADM approved e-version for the above noted Yellow Docket. The hard copy will be brought to you shortly.

Thank you,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector  
Department of Justice Canada / Government of Canada  
[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs  
Ministère de la Justice Canada / Gouvernement du Canada  
[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tél : 613-941-7888

**To:** Ministerial Correspondence Unit - Justice Canada[mcu@justice.gc.ca]  
**Subject:** FROM : Privy Council Office - Bureau du conseil privé [ Mail # : 197571 Folder # : 941526 Tracking # :  
62040146E ]  
**Sent:** Mon 8/8/2016 5:36:29 PM  
**From:** CIMS\_OPER

Final 62040146E.docx  
wEI7jKzD.TIF

Attention : Jody Wilson-Raybould, P.C., M.P., Minister of Justice and Attorney General of Canada

The attached correspondence addressed to the Prime Minister is forwarded to your office for action or information as appropriate.

La correspondance ci-jointe adressée au Premier Ministre vous est transmise pour suite à donner ou pour information.

Correspondent / Correspondant :

Ms. Janet M. Fuhrer  
President  
Canadian Bar Association  
Suite 500  
865 Carling Avenue  
Ottawa (Ontario)  
K1S 5S8

Keywords / Mots-clés : Supreme Court of Canada - Neutral

Folder Number / Numéro de dossier: 941526

Tracking Number / Numéro de suivi: 62040146E

Date on Document / Date du document: 13 Jul 2016

Date Rec'vd ( by PCO ) / Date de récept.: 22 Jul 2016

For additional information, please call 941-6887

Pour de plus amples informations, veuillez composer le 941-6887

Date of this E-Mail / Date de la transmission : Mon 8 Aug 2016 1:36:29 PM

---

**To:** Ministerial Correspondence Unit - Justice Canada[mcu@justice.gc.ca]  
**Cc:** PLLSS Tracking SDPSL[PLLSS\_Tracking\_SDPSL@justice.gc.ca]; Crosby, Adair[Adair.Crosby@justice.gc.ca]; Roy, Brigitte[Brigitte.Roy@justice.gc.ca]; Zaluski, Stephen[Stephen.Zaluski@justice.gc.ca]  
**Subject:** JACTP\_2016-015839\_CBA\_SCC\_App\_Proc  
**Sent:** Thur 8/18/2016 2:17:18 PM  
**From:** Desbiens, Alex

JACTP 2016-015839 CBA SCC App Proc LETTER.docx

Good morning,

Please find attached the revised version of the letter with the changes from MO. We will bring you the hard copy shortly.

Thank you,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector

Department of Justice Canada / Government of Canada

Alex.desbiens@justice.gc.ca / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs

Ministère de la Justice Canada / Gouvernement of Canada

Alex.desbiens@justice.gc.ca / Tél : 613-941-7888

**To:** Fares, Patricia[Patricia.Fares@justice.gc.ca]  
**Subject:** FW: 2016-017643  
**Sent:** Thur 8/18/2016 2:36:36 PM  
**From:** Ministerial Correspondence Unit - Justice Canada

16-017643 incoming(1).pdf

For your information.

**From:** Desbiens, Alex  
**Sent:** August-18-16 10:21 AM  
**To:** Ministerial Correspondence Unit - Justice Canada  
**Cc:** Crosby, Adair; Roy, Brigitte; Zaluski, Stephen  
**Subject:** 2016-017643

Good morning,

We will be answering to this MCU letter separately from 2016-0015839. Can you please send us a yellow docket with due dates.

Thank you very much,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector

Department of Justice Canada / Government of Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs

Ministère de la Justice Canada / Gouvernement du Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tél : 613-941-7888

To: Desbiens, Alex[Alex.Desbiens@justice.gc.ca]  
From: Ferguson, Kristin  
Flag Status: 0x00000000  
Subject: 16-015839 incoming(1).pdf 16-015839 reply(4).rtf

16-015839 incoming(1).pdf  
16-015839 reply(4).rtf  
Goto Record 495618 in database 2.ccm

Hi Alex,

The MO asked us to add the line in yellow to this reply. I just wanted to check with you to make sure the line is accurate.

The original line in the correspondence was "The Right Honourable Justin Trudeau, Prime Minister of Canada, and I will carefully take into account the concerns you highlight as we finalize the process."

Thank you!

Kristin

Kristin Ferguson

Senior Writer/Editor | Rédactrice/révisseuse principale

Ministerial Correspondence Unit | Unité de la correspondance ministérielle

Justice Canada

Government of Canada | Gouvernement du Canada

Ottawa, Canada K1A 0H8

[kristin.ferguson@justice.gc.ca](mailto:kristin.ferguson@justice.gc.ca)

Tel. / Tél. 613-957-4210 | Fax / Téléc. 613-957-3559

N'hésitez pas à me répondre dans la langue officielle de votre choix |

Please feel free to reply in the official language of your choice

**To:** Desbiens, Alex[Alex.Desbiens@justice.gc.ca]  
**Subject:** 16-015839 incoming(1).pdf  
**Sent:** Thur 8/18/2016 6:17:02 PM  
**From:** Fares, Patricia

MO has asked for these to be updated. Could you make the changes where necessary please? (based on recent Supreme Court of Canada announcement about the appointment process)

Thank you

Patricia Fares

Writer | Rédactrice

Ministerial Correspondence Unit | Unité de la correspondance ministérielle

Justice Canada

Government of Canada | Gouvernement du Canada

Ottawa, Canada K1A 0H8

[patricia.fares@justice.gc.ca](mailto:patricia.fares@justice.gc.ca)

Tel. / Tél. 613-948-3013

**To:** Ministerial Correspondence Unit - Justice Canada[mcu@justice.gc.ca]  
**Cc:** PLLSS Tracking SDPSL[PLLSS\_Tracking\_SDPSL@justice.gc.ca]; Crosby, Adair[Adair.Crosby@justice.gc.ca]; Roy, Brigitte[Brigitte.Roy@justice.gc.ca]; Zaluski, Stephen[Stephen.Zaluski@justice.gc.ca]  
**Subject:** JACTP\_2016-017643\_BAR\_SCC\_Appointments (responds to 2016-015839 as well)  
**Sent:** Mon 8/29/2016 4:09:48 PM  
**From:** Desbiens, Alex

JACTP 2016-017643 BAR SCC Appointemnts FIN.pdf  
JACTP 2016-017643 BAR SCC Appointemnts LETTER.docx

Good afternoon,

Please find attached the PLLSS ADM approved e-version for the above noted Yellow docket for action (responds to 2016-015811 as well). The hard copy will be brought to you shortly.

Thank you,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector

Department of Justice Canada / Government of Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs

Ministère de la Justice Canada / Gouvernement du Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tél : 613-941-7888





Department of Justice  
Canada

Ministère de la Justice  
Canada

NUMÉRO DU DOSSIER/FILE #: 2016-015798

COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: PROTECTED B

**TITRE/TITLE: Appearance before the Standing Committee on Justice and Human Rights to discuss the Supreme Court of Canada Appointments Process**

**SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY**

- You will appear before the House of Commons Standing Committee on Justice and Human Rights on Thursday, August 11, 2016, at 2:00 p.m. to discuss the new Supreme Court of Canada appointments process. You are invited to provide opening remarks (approximately 20 minutes) and to answer questions posed by Committee members.
- The following three documents in support of your appearance are attached:
  - Speaking notes (**Tab 1**)
  - Q&As (**Tab 2**)
  - Chart summarizing past critiques of appointments process and how these are addressed by the new process (**Tab 3**)

Soumis par (secteur)/Submitted by (Sector):

Public Law and Legislative Services Sector

Responsable dans l'équipe du SM/Lead in the DM Team:

Claudine Patry

Revue dans l'ULM par/Edited in the MLU by:

Mariane Picard

Soumis au CM/Submitted to MO: August 5, 2016

2016-015798

Tab 1

## **HOUSE OF COMMONS**

### **SUPREME COURT OF CANADA APPOINTMENTS PROCESS**

#### **STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS**

#### **OPENING REMARKS – 20 MINUTES**

#### **MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA**

**AUGUST 11, 2016**

2016-015798

Tab 1

**Mr. Chair, members of the Committee,**

**I would like to begin by thanking you for agreeing to convene on this August afternoon. I know that being here means being pulled away from your ridings, and perhaps your own personal plans. I am grateful for your accommodating my request to brief you on the new selection process that the Government will use for Supreme Court appointments.**

## **Introduction**

**As you know, the Honourable Justice Thomas Cromwell will be retiring on September 1, 2016, creating a vacancy that we aim to fill during the Court's fall session.**

**As stated in my mandate letter, the Government is committed to a Supreme Court of Canada appointments process that is transparent, inclusive and accountable to Canadians. That includes engagement with all parties in the House of Commons, as well as consultation with all relevant stakeholders. That ensures that those appointed to the Court are functionally bilingual.**

2016-015798

Tab 1

**My aim today is two-fold: to outline the new process to you, detailing how it encompasses these and other fundamental values; and equally, to hear the Committee's views and perspectives, given your interest and expertise.**

**Before continuing, I want to emphasize the great sense of responsibility with which our Government approaches the Supreme Court of Canada appointments process. As this Committee knows well, the Supreme Court is an essential pillar of Canada's constitutional architecture. As the final court of appeal on all legal questions, including Constitutional issues, the Supreme Court plays a pivotal role in promoting respect for fundamental rights and the rule of law.**

**The way we select judges of the Supreme Court is therefore of the utmost importance. Enhancing the credibility of the appointment process will solidify Canadians' confidence in this fundamental institution.**

**Page 264**

**is withheld pursuant to section  
est retenue en vertu de l'article**

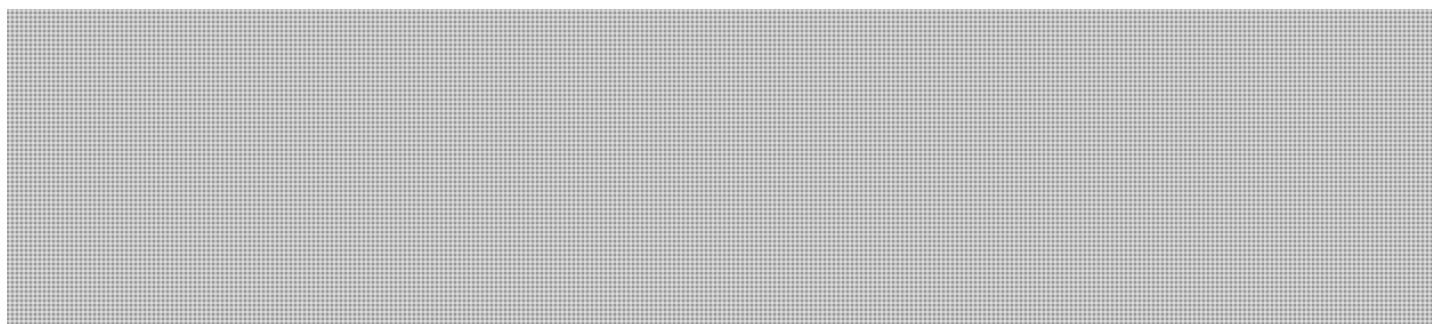
**21(1)(a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

2016-015798

Tab 1

**safeguard the tradition of appointing outstanding individuals to the Court.**



s.21(1)(a)

**I wish now to briefly describe how these three important values – transparency, inclusiveness and accountability – play out in the new selection process. I will then note two other factors that are equally crucial, namely: the need to safeguard judicial independence; and the desire to identify jurists of the highest caliber who represent the diversity of our country.**

### **The Values that Guide Us**

**A transparent process is one that is open, clear, and easily understood. This requires a clear public explanation of how the process is to operate. We have therefore provided not just a detailed description of the various steps in the process, but also information such as the criteria used to**

2016-015798

Tab 1

**assess candidates and the identity of those doing the assessment.**

**Last week we posted this information online so that Canadians can know and understand how, and on what basis, the next justice will be selected. My appearance before you today is another important part of this effort to publicly explain the process and ensure it is clear to all.**

**Transparency is also a prerequisite to accountability. If the process and criteria for decision-making are not publicly known, it is impossible to hold decision-makers to account for the exercise of their responsibilities. A process that is seen to be secretive may raise the perception that judges are selected based on reasons other than the established criteria.**

**As I will make clear later in my remarks, you, as members of the Justice and Human Rights Committee, will play a crucial role in holding the Government to account both for its selected nominee, and for its adherence to an established process.**

2016-015798

Tab 1

An inclusive process is one which ensures the widest range of candidates from the broadest variety of backgrounds is available for selection. It is a process characterized by outreach and engagement. The goal of inclusivity must be reflected in matters such as the manner in which the initial list of candidates is generated. Further, an inclusive process avoids criteria or procedures that can hinder individuals from traditionally underrepresented groups from receiving fair and equal consideration in the process.

A further value is the need to safeguard judicial independence, a requirement flowing from the Constitution itself. Judges must be, and be seen to be, fair, impartial and open-minded and not beholden to any group, interest or stated public position. Supreme Court justices must in no way be seen to be indebted to or dependent on those who select and appoint them. The role of the independent, non-partisan Advisory Board – which I will describe shortly – advances this principle.

Further, the selection process must safeguard the integrity of the Supreme Court and the judiciary in general in order to maintain public confidence. Care must be taken to avoid a



2016-015798

Tab 1

process that inadvertently undermines the judiciary as an institution, or the reputation of individual judges. This requires, for example, that the confidentiality of applicants be respected and preserved by all those involved in the process.

The selection process must be designed to identify individuals with the highest degree of professional excellence and personal suitability. Assessment of candidates must be based on objective criteria that set out the professional capacities and personal qualities needed to serve effectively as a justice of the Supreme Court of Canada. To this end, consultations and decisions at all stages of the selection process will be guided by assessment criteria that have been published on the website of the Office of the Commissioner for Federal Judicial Affairs, and which I will review later in my remarks.

Canadian society is rich in diversity and this has important consequences for the selection process. Justices of the Supreme Court of Canada must be able to adjudicate complex legal questions affecting those with a wide variety of experiences, backgrounds and perspectives. For this

2016-015798

Tab 1

reason, one of the assessment criteria is the ability to appreciate a diversity of views, perspectives and life experiences, including those relating to groups historically disadvantaged in Canadian society.

Diversity within the Supreme Court *itself* is important for two main reasons. First, bringing together individuals with various perspectives and life experiences enriches the collegial decision-making process of the Court. Second, a Supreme Court that reasonably reflects the diversity of the society it serves enhances public confidence in the Court. The assessment criteria therefore require that candidates be considered with a view towards ensuring that members of the Supreme Court are reasonably reflective of the diversity of Canadian society.

### **The Selection Process**

The selection process that I will now describe is designed to concretely embody these values and objectives, both for the purposes of the pending and future vacancies.

2016-015798

Tab 1

At the heart of the process is an independent, non-partisan Advisory Board tasked with identifying suitable candidates for appointment. The seven-member Board is chaired by former Prime Minister Kim Campbell, and includes four members nominated by independent professional organizations. These are:

- Richard J. Scott – former Chief Justice of the Manitoba Court of Appeal, and current counsel, arbitrator and mediator in a Winnipeg law firm – nominated by the Canadian Judicial Council.
- Susan Ursel – a senior partner with a Toronto firm, and Chair of the Canadian component of the African Legal Research Team which provides legal research support to Envisioning Global LGBT Rights – nominated by the Canadian Bar Association.
- Jeff Hirsch – President of the Federation of Law Societies of Canada and partner with a Winnipeg law firm – nominated by the Federation of Law Societies.
- Camille Cameron – Dean of the Schulich School of Law at Dalhousie University, and Chair of the Canadian Council of Law Deans – nominated by the Canadian Council of Law Deans.

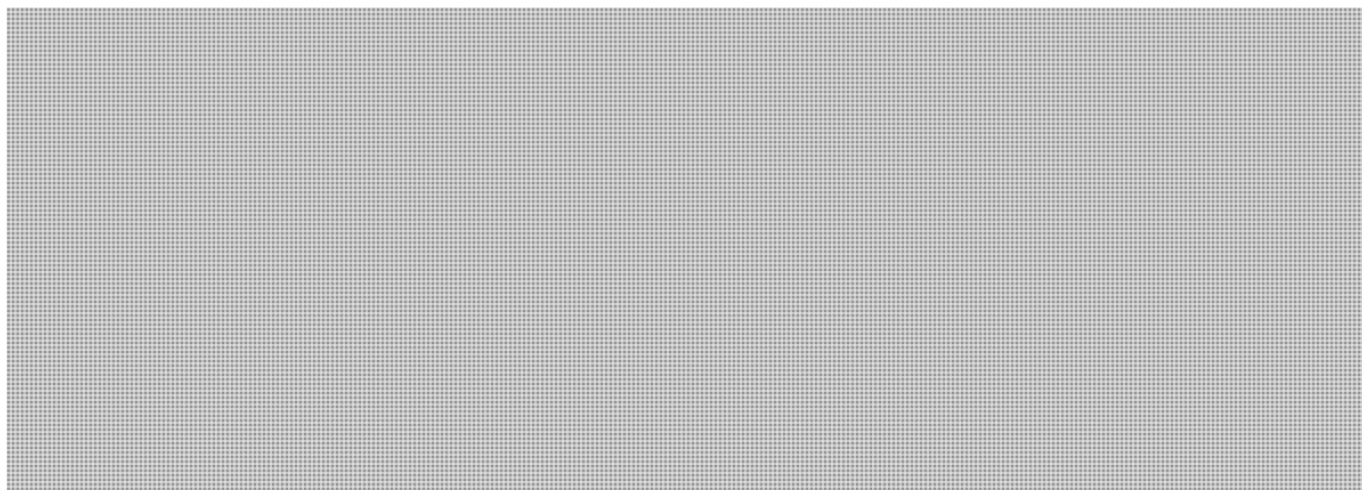
The Advisory Board also includes two lay members – that is, non-lawyers – nominated by me:

- Stephen Kakfwi – former Premier of the Northwest Territories and President of the Dene Nation, and currently working to improve the recognition and realities of Aboriginal peoples within Canada.
- Lili-Anna Pereša – President and Executive Director of Centraide of Greater Montreal.

We believe the involvement of respected, outside stakeholder organizations is important to ensuring the objectivity and independence of the process. Representation from the judiciary and the legal community on the Advisory Board provides critical input into assessing the professional qualifications of candidates. The lay members provide valuable input and help bring a diversity of views to the Advisory Board's deliberations. And I am pleased that the Advisory Board itself represents the diverse soul of Canada.

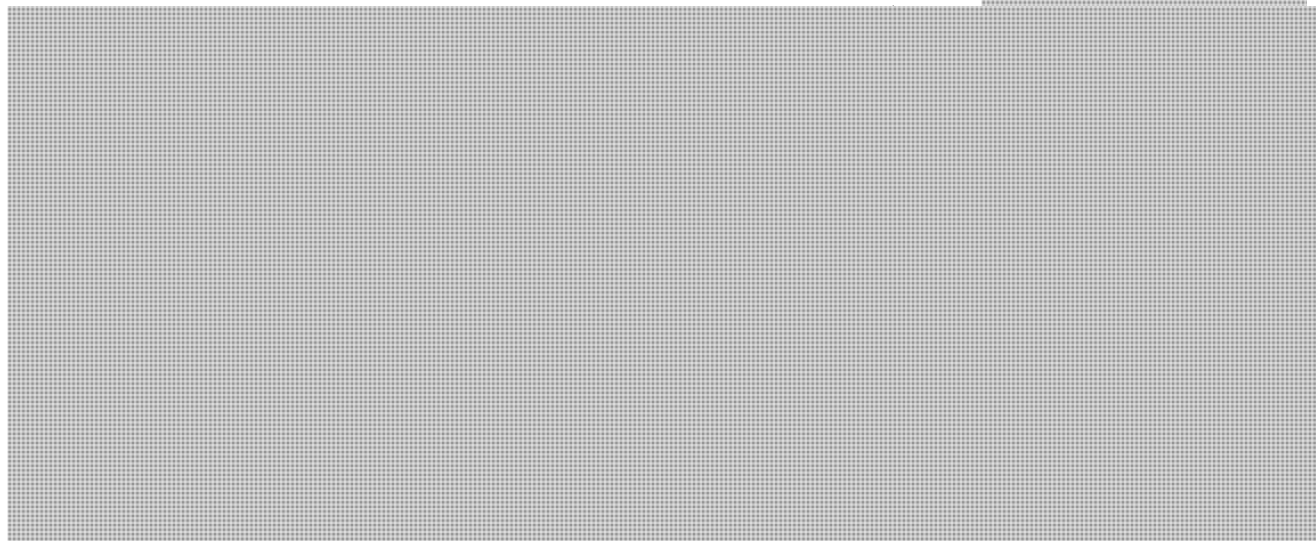
2016-015798

Tab 1



**Further, the application process will be open to Canadians from across the country. The Government is mindful of the custom of regional representation, and values the importance of regional diversity on the Court.**

s.21(1)(a)



**In assessing candidates, the Advisory Board will be guided by assessment criteria that have been made public, and by our Government's commitment to ensure that Supreme Court nominees are functionally bilingual.**

2016-015798

Tab 1

**As part of the assessment process the Advisory Board will consult with the Chief Justice of Canada and any key stakeholders that the members consider appropriate. I expect the Board's consultations will be wide and fulsome.**

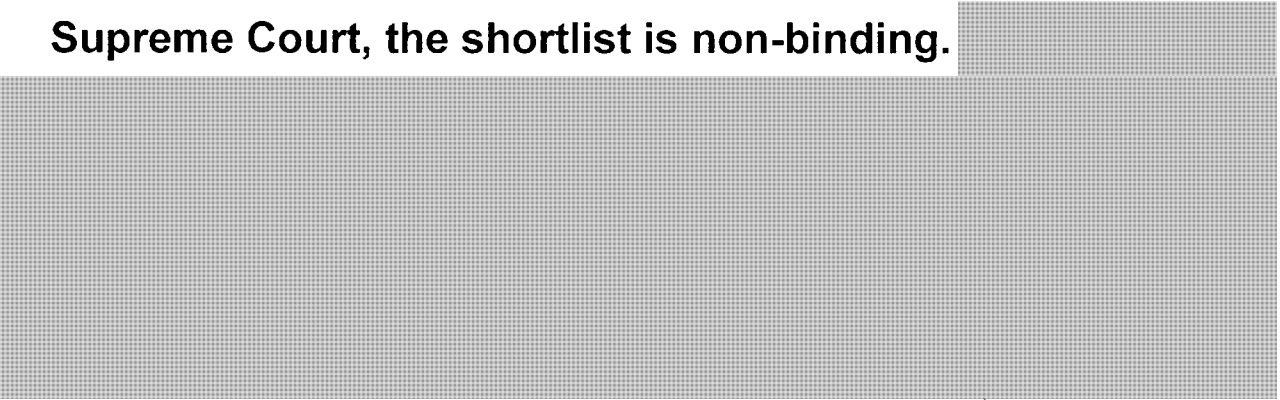
**While the objective of openness and transparency will inform all steps of the process, certain aspects of the process, such as the deliberations of the Advisory Board, will remain confidential.** [REDACTED]

[REDACTED] **On the other hand, the Advisory Board will** s.21(1)(a)

**provide a report to the Prime Minister, within one month of the vacancy being filled, outlining information about the process, including: statistics related to applications received; the manner in which the Board has executed its mandate; and the costs associated with the process. This report – which must be made public – may also contain recommendations for improvements to the process.**

**Upon concluding its assessment, the Advisory Board will submit a shortlist of three to five candidates for the Prime Minister's consideration, and will include an explanation of how these individuals meet the statutory requirements and**

**the assessment criteria. So as not to unduly fetter the Government's discretion in discharging its constitutionally mandated role to select an individual for appointment to the Supreme Court, the shortlist is non-binding.**



**All candidates on the shortlist must be functionally bilingual, as confirmed through an objective assessment administered by the Office of the Commissioner for Federal Judicial Affairs.**

**I will then consult on the shortlist of candidates with the Chief Justice of Canada, relevant provincial and territorial attorneys general, Cabinet colleagues, opposition Justice Critics, as well as members of this Committee and the Senate Committee on Legal and Constitutional Affairs.**

**The purpose of my consultations on the shortlist is to develop my recommendation to the Prime Minister as to who the Government's choice should be. The Prime Minister and I**

2016-015798

Tab 1

anticipate that choosing from a list of eminently qualified jurists will be a difficult and humbling task, and we will greatly value your views.

After the Prime Minister announces the Government's choice, I will appear with the Chairperson of the Advisory Board before this Committee to explain how the process unfolded and how our nominee meets the assessment criteria. The main purpose is to allow you, as parliamentarians, to hold our Government to account for the manner in which we have selected the nominee. There will be a week between the announcement of the nominee and the hearing in order to give the Committee time to prepare.

In addition to this hearing, the nominee will take part in a question and answer session moderated by a law professor with members of this Committee, the Senate Committee on Legal and Constitutional Affairs, and representatives from the Bloc Québécois and the Green Party.

The Prime Minister will review and consider any views of the Committee prior to making his final selection.

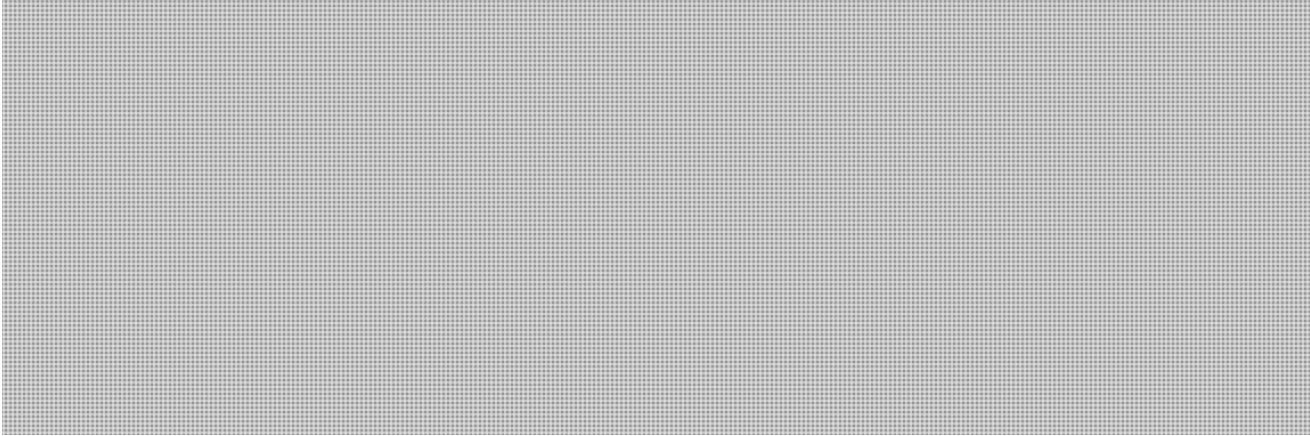


2016-015798  
Tab 1

## **Assessment Criteria**

**Before concluding, I would like to briefly discuss the assessment criteria that will guide all decisions throughout the process. The assessment criteria relate to the skills, experience and qualities candidates need in order to excel at the judicial function. The criteria also relate to the institutional needs of the Supreme Court.**

**As I noted earlier, these criteria have been published on the website of the Office of the Commissioner for Federal Judicial Affairs. I encourage you to visit this website, given that the document in which the criteria are found sets out the rationale for why each criterion is included. Given my limited time, I will limit myself to listing the criteria themselves.**



s.21(1)(a)

2016-015798

Tab 1

**Candidates will be assessed against the following personal skills and experience:**

- **Demonstrated superior knowledge of the law;**
- **Superior analytical skills;**
- **Ability to resolve complex legal problems;**
- **Awareness of, and ability to synthesize information about, the social context in which legal disputes arise;**
- **Clarity of thought, particularly as demonstrated through written expression;**
- **Ability to work under significant time pressures requiring diligent review of voluminous materials in any area of law; and**
- **Commitment to public service.**

**Applicants will also be assessed based on the following personal qualities:**

- **Irreproachable personal and professional integrity;**
- **Respect and consideration for others;**

2016-015798

Tab 1

- Ability to appreciate a diversity of views, perspectives and life experiences, including those relating to groups historically disadvantaged in Canadian society;
- Moral courage;
- Discretion; and
- Open-mindedness.

And finally, in carrying out their assessments, the Advisory Board will consider the following institutional needs of the Court:

- Ensuring a reasonable balance between public and private law expertise, bearing in mind the historic patterns of distribution between those areas in Supreme Court appeals;
- Expertise in any specific subject matter that regularly features in appeals and is currently underrepresented on the Court; and
- Ensuring that the members of the Supreme Court are reasonably reflective of the diversity of Canadian society.

2016-015798

Tab 1

**The Government is confident that the application of these assessment criteria will lead to the identification of outstanding candidates for our highest court, both now and into the future.**

## **Conclusion**

**I wish to thank you again for agreeing to convene today on what I know we all agree is a matter of utmost importance to Canadians. I look forward to appearing before you again in the near future.**

**I would be happy now to answer your questions, and to hear your comments and perspectives.**

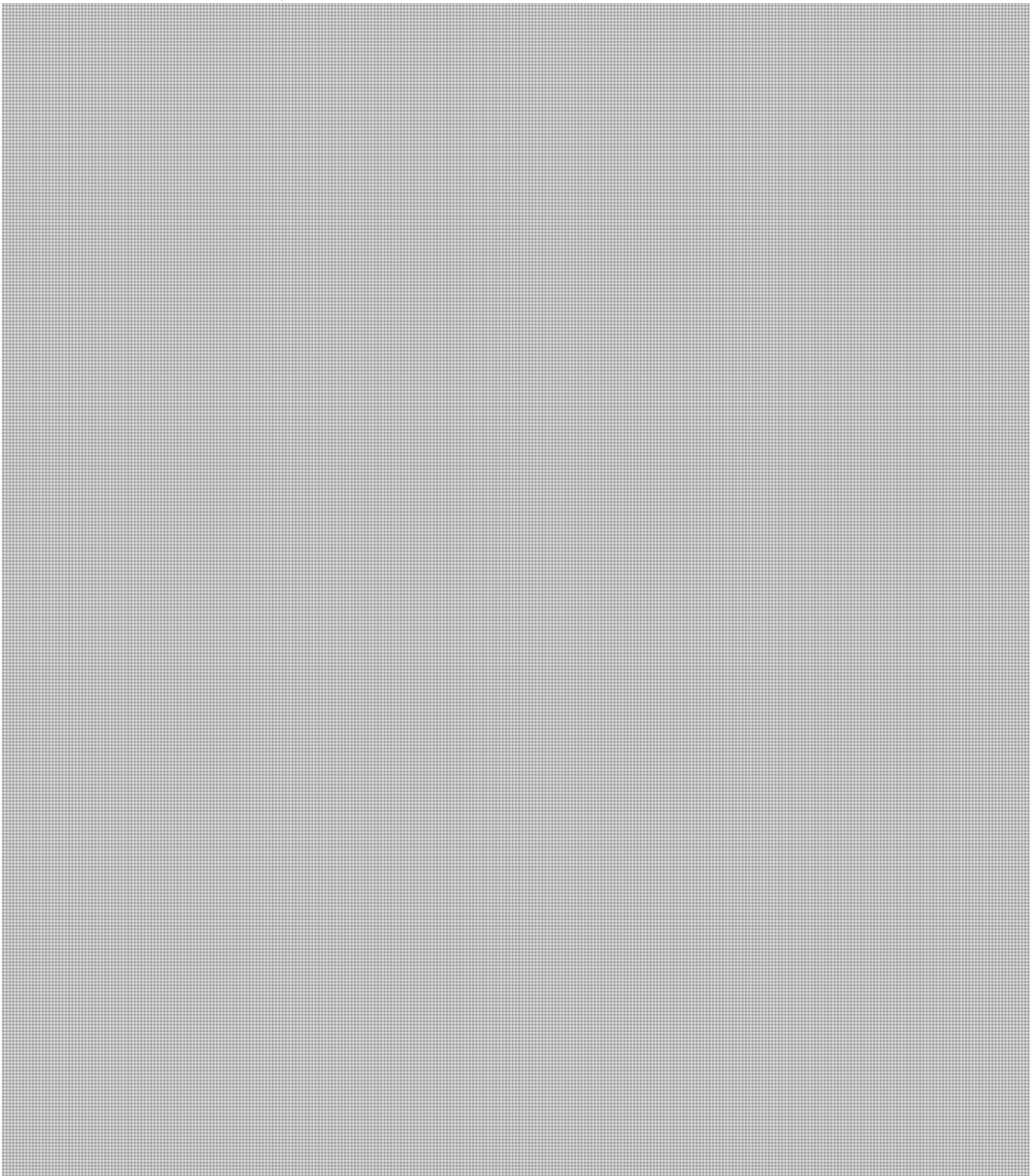
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2016-015798

Tab 2

DRAFT

**SUPREME COURT APPOINTMENTS PROCESS**  
**QUESTIONS AND ANSWERS**



**Pages 281 to / à 302  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**21(1)(a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

## NOTE POUR LA PÉRIODE DE QUESTIONS

### PROCESSUS DE NOMINATION DES JUGES À LA COUR SUPRÊME DU CANADA

#### CONTEXTE:

Comment le Gouvernement du Canada respecte son engagement à renforcer le processus de nomination des juges de la Cour suprême du Canada et de s'assurer que les personnes nouvellement nommées sont fonctionnellement bilingue?

#### RÉPONSE PROPOSÉE :

- Le 2 août, 2016, le premier ministre a annoncé un nouveau processus de nomination des juges de la Cour suprême du Canada. Le gouvernement donne ainsi suite à l'engagement qu'il a pris d'instituer un processus transparent et inclusif, par lequel des comptes seront rendus aux Canadiens et aux Canadiennes, et de veiller à ce que les juges nommés soient effectivement bilingues.
- L'ouverture de ce nouveau processus est sans précédent. Après un processus ouvert de dépôt de candidatures, un conseil consultatif indépendant et non partisan, présidé par l'ancienne première ministre Kim Campbell, évaluera les candidats et les candidates en se fondant sur des critères publiés et il produira une liste abrégée de trois à cinq juristes exceptionnels.
- Les parlementaires joueront un rôle clé à plusieurs stades :
  - Je consulterai les porte-parole de l'opposition pour la justice et les membres du Comité de la justice de la Chambre des communes au sujet de la liste abrégée.
  - Je comparaitrai devant le Comité de la justice avec M<sup>me</sup> Campbell pour expliquer le choix du gouvernement.
  - Enfin, le ou la juge proposé(e) prendra part à une séance dirigée de questions et de réponses avec des représentants de tous les partis présents à la Chambre des communes et avec des sénateurs.
- Ce processus fera en sorte que des juristes exceptionnels et effectivement bilingues, dont le profil reflète celui de la société

**canadienne, soient nommés à la plus haute cour du pays.**

*Si l'on demande si le Canada atlantique perdra son siège à la Cour :*

- **Notre gouvernement se soucie de préserver un équilibre régional au sein de la Cour et il s'efforcera de le conserver. Toutefois, il veut aussi s'assurer que le meilleur candidat ou la meilleure candidate soit choisi pour occuper chaque poste vacant, peu importe la région du Canada d'où il ou elle sera originaire.**
- **Comme le juge Cromwell est originaire de la Nouvelle-Écosse, le premier ministre a demandé au Conseil consultatif d'inclure des Canadiens et des Canadiennes de l'Atlantique dans la liste abrégée.**

*Si des questions portent sur le bilinguisme fonctionnel :*

- **Pour être effectivement bilingue, un candidat ou une candidate doit pouvoir lire les documents et comprendre les plaidoiries dans les deux langues officielles, sans devoir recourir à la traduction ou à l'interprétation. Idéalement, cette personne pourrait aussi converser en anglais et en français avec les avocats, mais cela n'est pas une condition obligatoire.**

*Si des questions sont posées sur la faible participation des partis politiques à la conception du processus :*

- **En prenant son engagement, le gouvernement avait l'intention de faire en sorte que les députés prennent part au processus lui-même.**
- **Comme je l'ai décrit, le nouveau processus accorde un rôle important aux députés et il leur procure de nombreuses occasions d'y prendre part. Je mentionne entre autres la possibilité pour les membres du Comité permanent de la justice et des droits de la personne de s'exprimer sur les améliorations éventuelles à apporter au processus, en fonction de l'expérience acquise relativement à la dotation du poste vacant dont il s'agit ici.**

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## Question Period Note

### SUPREME COURT OF CANADA APPOINTMENTS PROCESS

#### ISSUE:

How is the Government delivering on its commitment to strengthen the process for appointing Supreme Court of Canada justices and ensure new appointees are functionally bilingual?

#### PROPOSED RESPONSE:

- On August 2, 2016, the Prime Minister announced a new process to appoint justices of the Supreme Court of Canada. It reflects our commitment to a process that is transparent, inclusive and accountable to Canadians, and to ensure that appointees are functionally bilingual.
- The openness of this new process is unprecedented. Following an open application process, an independent, non-partisan Advisory Board—chaired by former Prime Minister Kim Campbell—will assess candidates based on published criteria and produce a shortlist of three to five outstanding jurists.
- Parliamentarians will play an essential role at several points:
  - I will consult Opposition Justice critics and members of the House Justice Committee on the shortlist.
  - I will appear before the Justice Committee with Ms. Campbell to explain the Government's choice.
  - Finally, the nominee will take part in a moderated question and answer session with representatives of all parties in the House and Senators.
- This process will ensure that outstanding, functionally bilingual jurists who are reflective of Canadian society are appointed to our top court.

*If asked about whether Atlantic Canada will lose its seat on the Court:*

- Our Government values a regional balance on the Court and will seek to maintain it. However, we also want to ensure that the best candidate is identified for each vacancy, regardless of where in Canada they are

from.

- Given that Justice Cromwell is from Nova Scotia, the Prime Minister has asked the Advisory Board to include Atlantic Canadians on the shortlist.

*If asked about functional bilingualism:*

- To be functionally bilingual, a candidate must be able to read materials and understand oral argument in both official languages, without the need for translation or interpretation. Ideally, he or she could also converse with counsel in both languages, but this is not a requirement.

*If asked about the lack of engagement of political parties on the design of the process:*

- The intention of the Government's commitment was to ensure that members of Parliament are engaged in the process itself.
- As I have described, the new process gives an important role to members of Parliament and provides many opportunities for their involvement. This includes hearing from members of the Standing Committee on Justice and Human Rights on possible improvements to the process, based on the experience with filling this current vacancy.

## BACKGROUND:

Echoing the Liberal Party platform, the Minister's mandate letter states: "Engage all parties in the House of Commons to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians. Consultations should be undertaken with all relevant stakeholders and those appointed to the Supreme Court should be functionally bilingual."

Since 2004, successive governments have used various processes for filling Supreme Court of Canada (SCC) vacancies. Some involved an advisory committee, composed exclusively or partially of parliamentarians, to recommend a shortlist of candidates derived from a longer list provided by the Government's choice; in other cases, the nominees themselves appeared. For the three most recent appointments, neither an advisory committee nor a parliamentary hearing was used.

On March 22, 2016, the Supreme Court of Canada announced Justice Cromwell's retirement, effective September 1, 2016.

On August 2, 2016, the Prime Minister announced a new appointment process that would be used for Justice Cromwell's pending vacancy as well as future ones. This included the establishment of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments, chaired by former Prime Minister Kim Campbell (nominated by the Minister of Justice), and consisting of six other members: two lay members nominated by the Minister of Justice and four jurists nominated by outside legal organizations (Canadian Judicial Council, Canadian Bar Association, Federation of Law Societies of Canada, and Canadian Council of Law Deans).

The August 2 announcement coincided with the launch of the first ever open application process for SCC appointments. Questionnaires completed by candidates are sent to the Office of the Commissioner for Federal Judicial Affairs (CFJA), whose officials will be providing secretariat support to the Advisory Board. The CFJA website provides links to the terms of reference for the Advisory Board, the Qualifications and Assessment Criteria, instructions on how to apply, and Frequently Asked Questions related to the process.

Media reports since the Prime Minister's announcement have been mixed, welcoming the increased transparency and independence of the process but criticizing certain aspects. The main critiques are listed below.

- Potential departure from regional convention: While the Prime Minister's mandate letter to the Advisory Board (published on the PM website) asks that the shortlist include candidates from Atlantic Canada, the application is open to all Canadians and the Government has made clear that it is not committed to following the regional custom. Commentators and Justice critic Rob Nicholson have criticized the potential loss of the "Atlantic seat" on the Court.
- Requirement for functional bilingualism: Several commentators have suggested that requiring candidates to be functionally bilingual unduly narrows the field, and some have questioned the constitutionality of setting this as a requirement. Conversely, certain commentators have argued that the functional bilingualism requirement should be enshrined in legislation.
- Focus on diversity over merit: Some commentators have criticized the emphasis on diversity, arguing that this risks the appointment of SCC justices based on characteristics other than their legal skill.
- Lack of participation of MPs on Advisory Board: Some commentators have drawn attention to the fact that in previous processes, MPs participated in the development of a shortlist, and so have criticized the Advisory Board as being elitist and lacking in the legitimacy brought by the participation of elected representatives.
- Lack of consultation on design of process: Some commentators – particularly NDP leader Tom Mulcair and Justice critic Murray Rankin – have criticized the fact that Opposition parties were not consulted on the design of the process.

## CONTACTS:

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Justice Canada

**STANDING COMMITTEE ON JUSTICE AND  
HUMAN RIGHTS**

**NEW PROCESS FOR THE NOMINATION OF  
SUPREME COURT JUSTICES**

**THURSDAY, AUGUST 11, 2016**

**2:00 P.M. – 4:00 P.M.**

**PARLIAMENT HILL, CENTRE BLOCK  
ROOM 253-D**

## Table of Contents

<b>Tab A .....</b>	<b>Briefing Materials</b>
Tab 1 .....	Briefing Materials for Committee Appearance
Tab i .....	Opening Remarks
Tab ii .....	Q & As: Appointment Process
Tab iii .....	Response to Past Critiques
Tab 2 .....	Draft Questions from Justice Committee and Answers
Tab 3 .....	Comments of Chief Justice McLachlin re: Indigenous judges and proposed response
Tab i .....	Toronto Star article: More indigenous judges needed in lower courts to develop skills for SCC
Tab ii .....	Responsive Q & As
<b>Tab B .....</b>	<b>Key Announcements: Appointment Process</b>
Tab 1 .....	Key Messages (PMO)
Tab 2 .....	News Release: New Process for Judicial Appointments to SCC
Tab 3 .....	Backgrounder
Tab 4 .....	Op-ed by Prime Minister, Globe and Mail
Tab 5 .....	FAQs (CFJA)
<b>Tab C .....</b>	<b>Appointment Process</b>
<b>Qualifications and Assessment Criteria</b>	
Tab 1 .....	Qualifications and Assessment Criteria
Tab 2 .....	Questionnaire
<b>Advisory Board</b>	
Tab 3 .....	List of Advisory Board Members and Bios
Tab 4 .....	Order in Council Establishing Advisory Board and Schedule (Mandates and Terms and Conditions)
Tab 5 .....	Terms of Reference of Advisory Board



Department of Justice  
Canada

Ministère de la Justice  
Canada

NUMÉRO DU DOSSIER/FILE #: 2016-015798

COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: PROTECTED B

**TITRE/TITLE:** Appearance before the Standing Committee on Justice and Human Rights to discuss the Supreme Court of Canada Appointments Process

**SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY**

- You will appear before the House of Commons Standing Committee on Justice and Human Rights on Thursday, August 11, 2016, at 2:00 p.m. to discuss the new Supreme Court of Canada appointments process. You are invited to provide opening remarks (approximately 20 minutes) and to answer questions posed by Committee members.
- The following three documents in support of your appearance are attached:
  - Speaking notes (Tab 1)
  - Q&As (Tab 2)
  - Chart summarizing past critiques of appointments process and how these are addressed by the new process (Tab 3)

Soumis par (secteur)/Submitted by (Sector):

Public Law and Legislative Services Sector

Responsable dans l'équipe du SM/Lead in the DM Team:

Claudine Patry

Revue dans l'ULM par/Edited in the MLU by:

Mariane Picard

Soumis au CM/Submitted to MO:

2016-015798

Tab 1

# **HOUSE OF COMMONS**

## **SUPREME COURT OF CANADA APPOINTMENTS PROCESS**

### **STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS**

#### **OPENING REMARKS – 20 MINUTES**

#### **MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA**

**AUGUST 11, 2016**

2016-015798

Tab 1

**Mr. Chair, members of the Committee,**

**I would like to begin by thanking you for agreeing to convene on this August afternoon. I know that being here means being pulled away from your ridings, and perhaps your own personal plans. I am grateful for your accommodating my request to brief you on the new selection process that the Government will use for Supreme Court appointments.**

### **Introduction**

**As you know, the Honourable Justice Thomas Cromwell will be retiring on September 1, 2016, creating a vacancy that we aim to fill during the Court's fall session.**

**As stated in my mandate letter, the Government is committed to a Supreme Court of Canada appointments process that is transparent, inclusive and accountable to Canadians. One that includes engagement with all parties in the House of Commons, as well as consultation with all relevant stakeholders, and that ensures those appointed to the Court are functionally bilingual.**



2016-015798

Tab 1

**My aim today is two-fold. First, to outline the new process to you, detailing how it encompasses these and other fundamental values; and second, to hear the Committee's views and perspectives, given your interest and expertise.**

**Before continuing, I want to emphasize the great sense of responsibility with which our Government approaches the Supreme Court of Canada appointments process. As this Committee knows well, the Supreme Court is an essential pillar of Canada's constitutional architecture. As the final court of appeal on all legal questions, including Constitutional issues, the Supreme Court plays a pivotal role in promoting respect for fundamental rights and the rule of law.**

**The way we select judges of the Supreme Court is therefore of the utmost importance. Enhancing the credibility of the appointment process will bolster Canadians' confidence in this fundamental institution.**

**Page 314**

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est retenue en vertu de l'article**

**21(1)(a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

I wish now to briefly describe how these three important values – transparency, inclusiveness and accountability – play out in the new selection process. I will then note two other factors that are equally crucial, namely: the need to safeguard judicial independence; and the desire to identify jurists of the highest caliber who represent the diversity of our country.

### **The Values that Guide Us**

A transparent process is one that is open, clear, and easily understood. This requires a clear public explanation of how the process is to operate. We have therefore provided not just a detailed description of the various steps in the process, but also information such as the criteria used to assess candidates and the identity of those doing the assessment.

Last week we posted this information online so that Canadians can know and understand how, and on what basis, the next justice will be selected. My appearance before you today is another important part of this effort to publicly explain the process and ensure it is clear to all.

Transparency is also a prerequisite to accountability. If the process and criteria for decision-making are not publicly known, it is difficult to hold decision-makers to account for the exercise of their responsibilities. As such, this process is designed to be open, transparent, and based on established and publicly available criteria.

As I will make clear later in my remarks, you, as members of the Justice and Human Rights Committee, will play a crucial role in holding the Government to account both for its selected nominee, and for its adherence to an established process.

An inclusive process is one which ensures the widest range of candidates from the broadest variety of backgrounds is available for selection. It is a process characterized by outreach and engagement. The goal of inclusivity must be

reflected in matters such as the manner in which the initial list of candidates is generated. Further, an inclusive process avoids criteria or procedures that can hinder individuals from traditionally underrepresented groups from receiving fair and equal consideration in the process.

A further value is the need to safeguard judicial independence, a requirement flowing from the Constitution itself. Judges must be, and be seen to be, fair, impartial and open-minded and not beholden to any group or interest. Supreme Court justices must in no way be seen to be indebted to or dependent on those who select and appoint them. The role of the independent, non-partisan Advisory Board – which I will describe shortly – advances this principle.

Further, the selection process must safeguard the integrity of the Supreme Court and the judiciary in general in order to maintain public confidence. Care must be taken to avoid a process that inadvertently undermines the judiciary as an institution, or the reputation of individual judges. This requires, for example, that the confidentiality of applicants be

respected and preserved by all those involved in the process.

The selection process must be designed to identify individuals with the highest degree of professional excellence and personal suitability. Assessment of candidates must be based on objective criteria that set out the professional capacities and personal qualities needed to serve effectively as a justice of the Supreme Court of Canada. To this end, consultations and decisions at all stages of the selection process will be guided by assessment criteria that have been published on the website of the Office of the Commissioner for Federal Judicial Affairs, and which I will review later in my remarks.

Canadian society is rich in diversity and this has important consequences for the selection process. Justices of the Supreme Court of Canada must be able to adjudicate complex legal questions affecting those with a wide variety of experiences, backgrounds and perspectives. For this reason, one of the assessment criteria is the ability to appreciate a diversity of views, perspectives and life

experiences, including those relating to groups historically disadvantaged in Canadian society.

Diversity within the Supreme Court *itself* is important for two main reasons. First, bringing together individuals with various perspectives and life experiences enriches the collegial decision-making process of the Court. Second, a Supreme Court that reflects the diversity of the society it serves enhances public confidence in the Court. The assessment criteria therefore require that candidates be considered with a view towards ensuring that members of the Supreme Court are reasonably reflective of the diversity of Canadian society.

### **The Selection Process**

The selection process that I will now describe is designed to concretely embody these values and objectives.

At the heart of the process is an independent, non-partisan Advisory Board tasked with identifying suitable candidates for appointment. The seven-member Board is chaired by former Prime Minister Kim Campbell, and includes four

2016-015798

Tab 1

members nominated by independent professional organizations. These are:

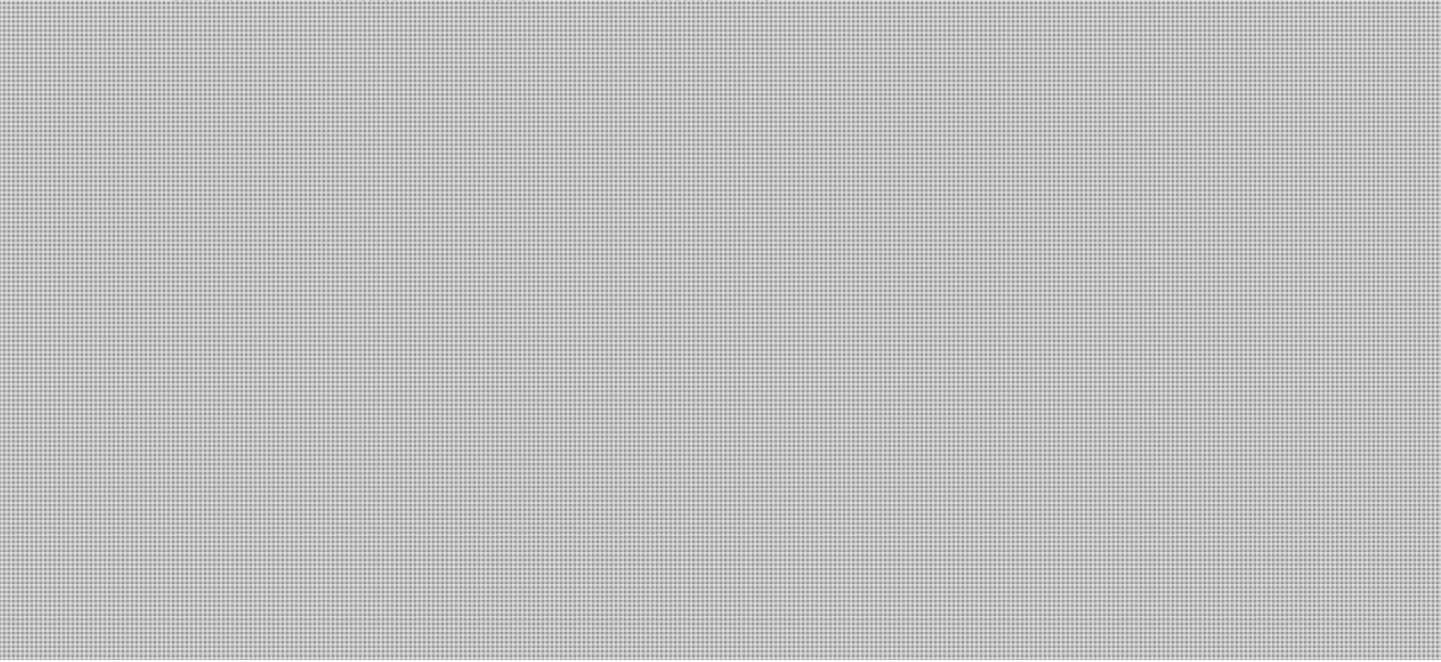
- **Richard J. Scott** – former Chief Justice of the Manitoba Court of Appeal, and currently counsel in a Winnipeg law firm – nominated by the Canadian Judicial Council.
- **Susan Ursel** – a senior partner with a Toronto law firm, who also provides legal research support to Envisioning Global LGBT Rights – nominated by the Canadian Bar Association.
- **Jeff Hirsch** – President of the Federation of Law Societies of Canada and partner with a Winnipeg law firm – nominated by the Federation of Law Societies.
- **Camille Cameron** – Dean of the Schulich School of Law at Dalhousie University, and President of the Canadian Council of Law Deans – nominated by the Canadian Council of Law Deans.

The Advisory Board also includes two government-appointed non-lawyers:

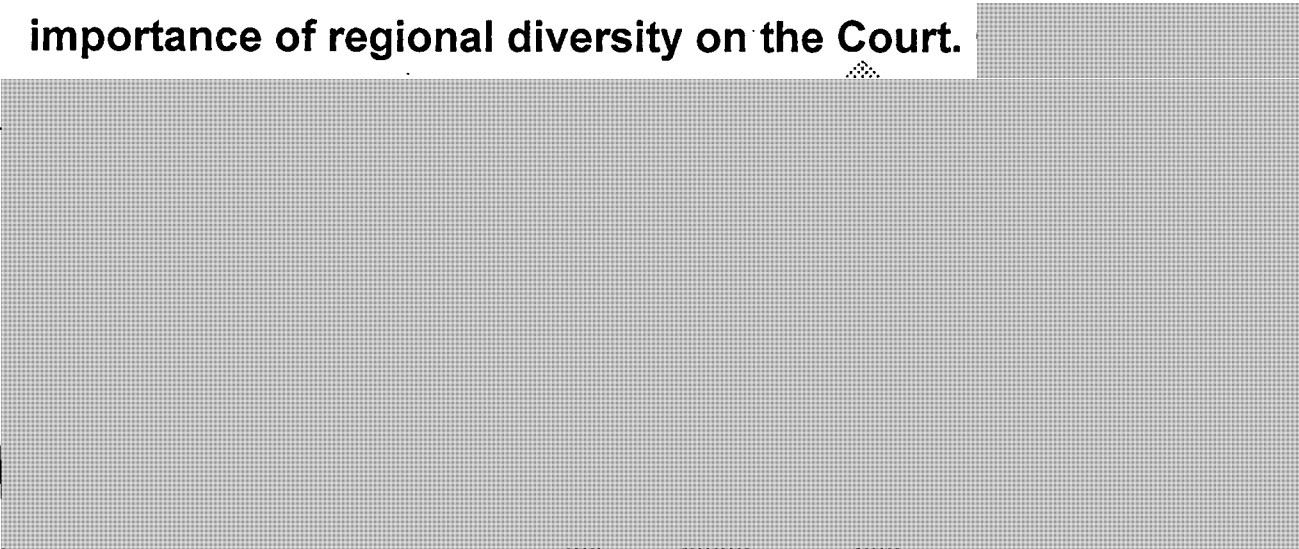


- **Stephen Kakfwi** – former Premier of the Northwest Territories and President of the Dene Nation, and currently working to improve the recognition and realities of Indigenous peoples within Canada.
- **Lili-Anna Pereša** – President and Executive Director of Centraide of Greater Montreal.

We believe the involvement of respected stakeholder organizations is important to ensure the objectivity and independence of the process. Representation from the legal community on the Advisory Board provides critical input into assessing the professional qualifications of candidates. The lay members provide valuable input and help bring a diversity of views to the Advisory Board's deliberations.



**Further, the application process will be open to Canadians from across the country. The Government is mindful of the custom of regional representation, and values the importance of regional diversity on the Court.**



**In assessing candidates, the Advisory Board will be guided by assessment criteria that have been made public, and by our Government's commitment to ensure that Supreme Court nominees are functionally bilingual.**

**As part of the assessment process the Advisory Board will consult with the Chief Justice of Canada and any key stakeholders that the members consider appropriate. I expect the Board's consultations will be wide and fulsome.**

2016-015798

Tab 1

While the objective of openness and transparency will inform all steps of the process, certain aspects of the process, such as the deliberations of the Advisory Board, will remain confidential.

To

promote transparency, the Advisory Board will provide a report to the Prime Minister, within one month of the vacancy being filled, outlining information about the process, including: statistics related to applications received; the manner in which the Board has executed its mandate; and the costs associated with the process. This report – which must be made public – may also contain recommendations for improvements to the process.

s.21(1)(a)

Upon concluding its assessment, the Advisory Board will submit a shortlist of three to five candidates for the Prime Minister's consideration, and will include an explanation of how these individuals meet the statutory requirements and the assessment criteria.

2016-015798

Tab 1

**All candidates on the shortlist must be functionally bilingual, as confirmed through an objective assessment administered by the Office of the Commissioner for Federal Judicial Affairs.**

**I will then consult on the shortlist of candidates with the Chief Justice of Canada, relevant provincial and territorial attorneys general, Cabinet colleagues, opposition Justice Critics, as well as members of this Committee and the Senate Committee on Legal and Constitutional Affairs.**

**The purpose of my consultations on the shortlist is to develop my recommendation to the Prime Minister as to who the Government's choice should be. The Prime Minister and I anticipate that choosing from a list of eminently qualified jurists will be a difficult and humbling task, and we will greatly value your views.**

**After the Prime Minister announces the Government's nominee, I will appear with the Chairperson of the Advisory Board before this Committee to explain how the process unfolded and how our nominee meets the assessment**

2016-015798

Tab 1

criteria. The main purpose is to allow you, as parliamentarians, to hold the Government to account for the manner in which the nominee has been selected. There will be a week between the announcement of the nominee and the hearing in order to give the Committee time to prepare.

In addition to this hearing, the nominee will take part in a question and answer session moderated by a law professor with members of this Committee, the Senate Committee on Legal and Constitutional Affairs, and representatives from the Bloc Québécois and the Green Party.

The Prime Minister will review and consider any views of the Committee prior to making his final selection.

### **Assessment Criteria**

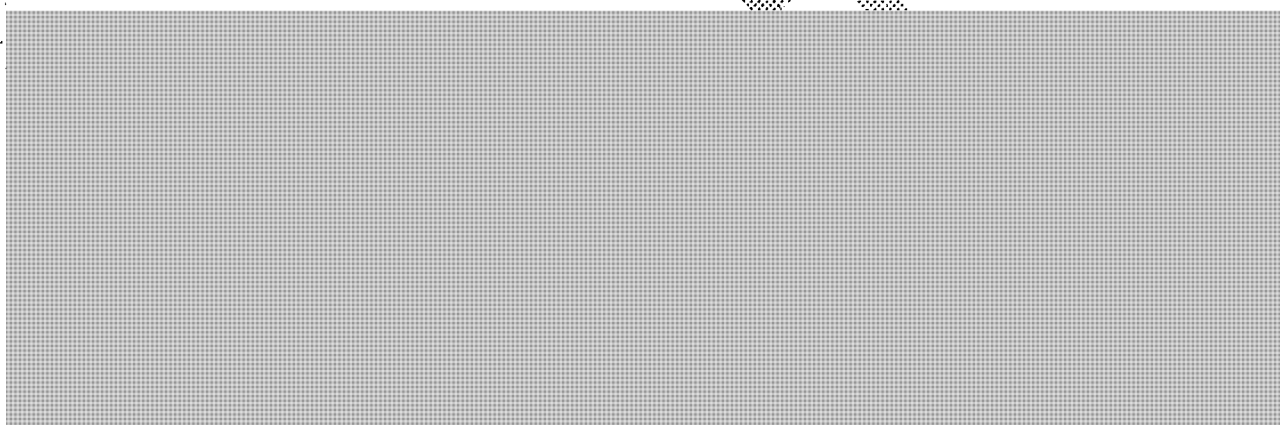
Before concluding, I would like to briefly discuss the assessment criteria that will guide all decisions throughout the process. The assessment criteria relate to the skills, experience and qualities candidates need to excel. The criteria also relate to the institutional needs of the Supreme Court.

2016-015798

Tab 1

**As I noted earlier, these criteria have been published on the website of the Office of the Commissioner for Federal Judicial Affairs. I encourage you to visit this website, given that the document in which the criteria are found sets out the rationale for why each criterion is included.**

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**Candidates will be assessed based on the following personal skills and experience:**

- **Demonstrated superior knowledge of the law;**
- **Superior analytical skills;**
- **Ability to resolve complex legal problems;**
- **Awareness of, and ability to synthesize information about, the social context in which legal disputes arise;**

- **Clarity of thought, particularly as demonstrated through written expression;**
- **Ability to work under significant time pressures requiring diligent review of voluminous materials in any area of law; and**
- **Commitment to public service.**

**Applicants will also be assessed based on the following personal qualities:**

- **Irreproachable personal and professional integrity;**
- **Respect and consideration for others;**
- **Ability to appreciate a diversity of views, perspectives and life experiences, including those relating to groups historically disadvantaged in Canadian society;**
- **Moral courage;**
- **Discretion; and**
- **Open-mindedness.**

**And finally, in carrying out their assessments, the Advisory Board will consider the following institutional needs of the Court:**

- Ensuring a reasonable balance between public and private law expertise, bearing in mind the historic patterns of distribution between those areas in Supreme Court appeals;
- Expertise in any specific subject matter that regularly features in appeals and is currently underrepresented on the Court; and
- Ensuring that the members of the Supreme Court are reasonably reflective of the diversity of Canadian society.

The Government is confident that the application of these assessment criteria will lead to the identification of outstanding candidates for our highest court.

## Conclusion

I wish to thank you again for agreeing to convene today on a matter of utmost importance to Canadians. I look forward to appearing before you again in the near future.

I would be happy now to answer your questions, and to hear your comments and perspectives.



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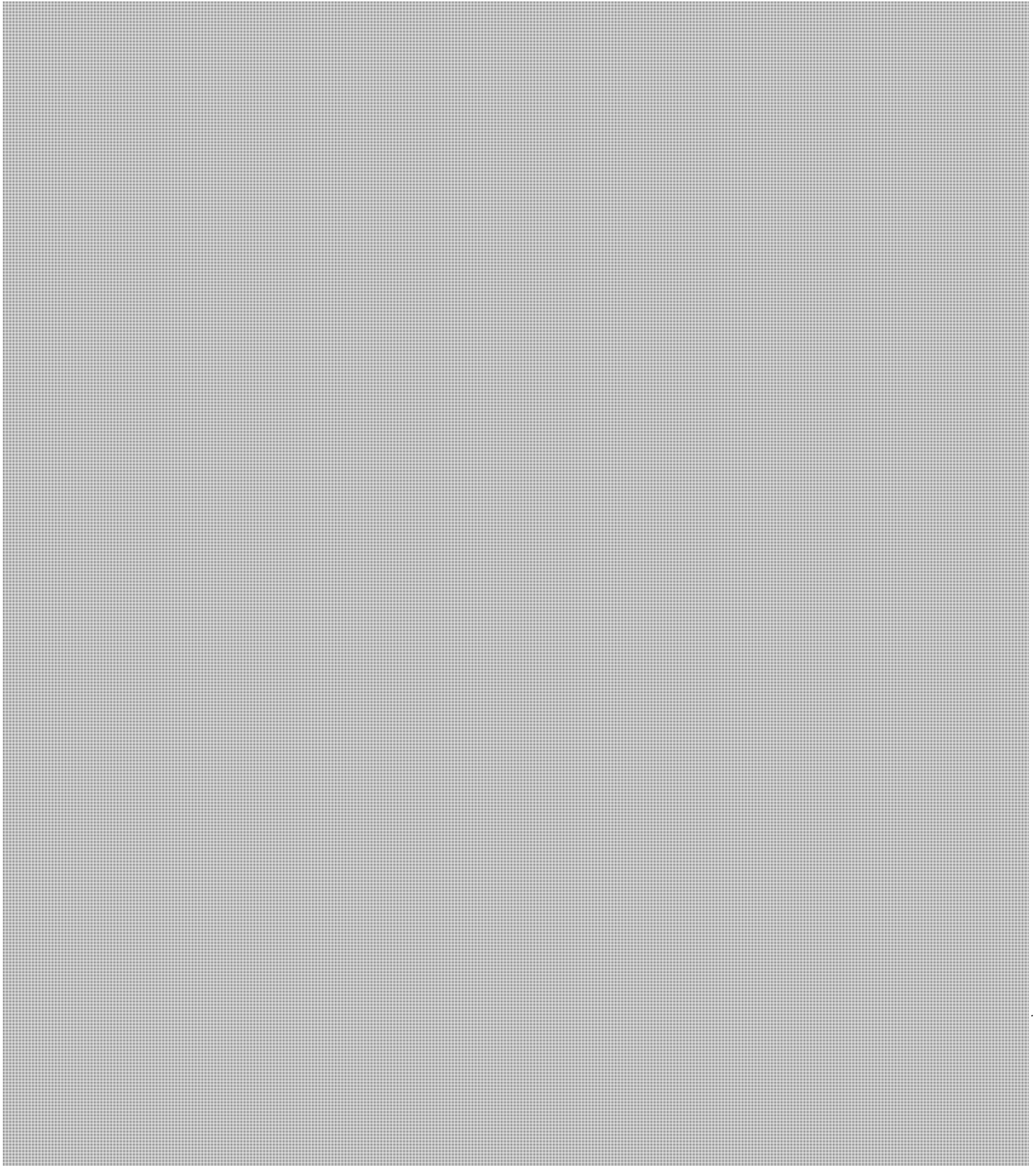
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2016-015798

Tab 2

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**SUPREME COURT APPOINTMENTS PROCESS**  
**QUESTIONS AND ANSWERS**



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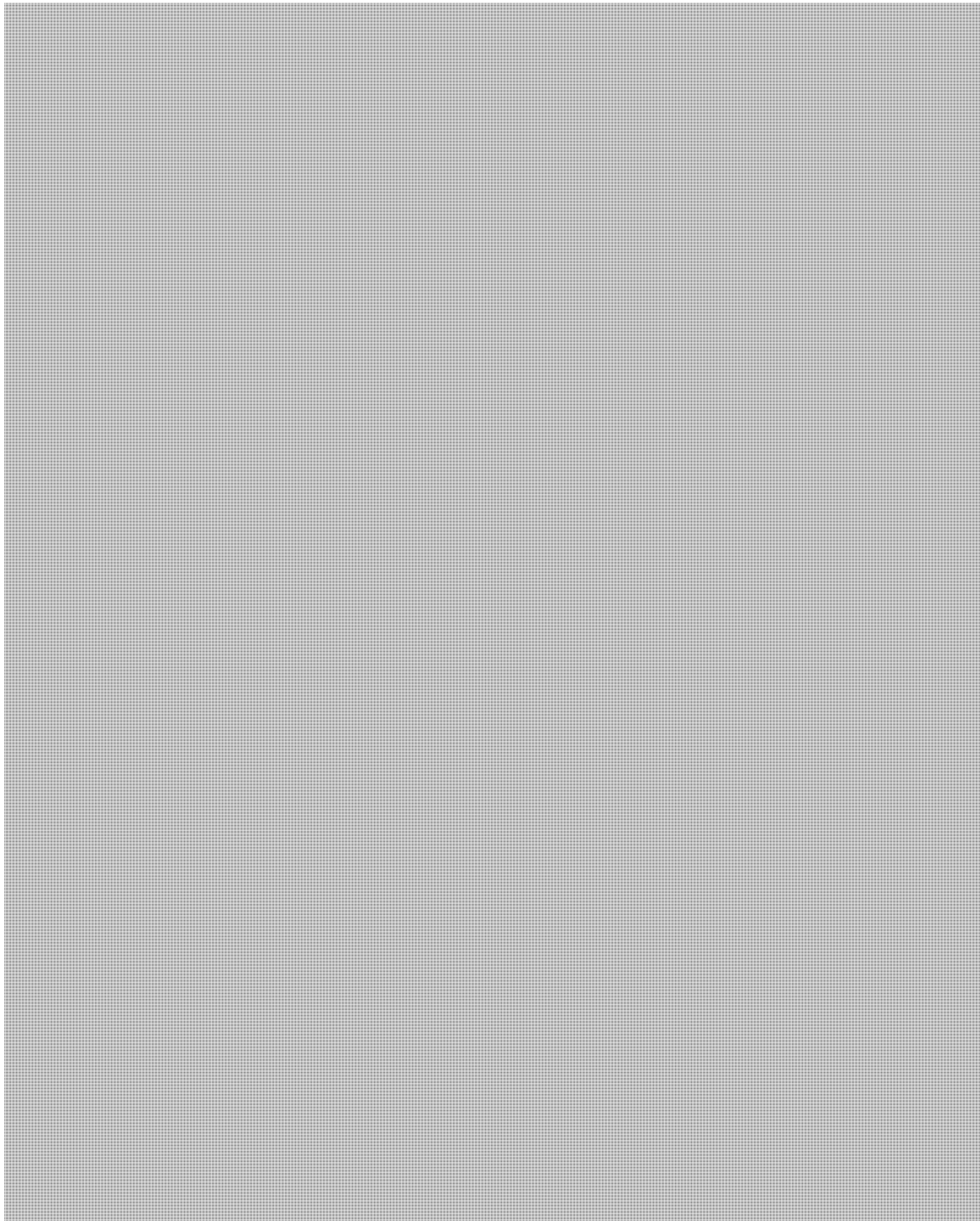
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## JUST Q's - SCC

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**Pages 353 to / à 365  
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**21(1)(a)**

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## McKinnon, Catherine

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**From:** Media-Relations-Medias  
**Sent:** August 10, 2016 8:25 AM  
**Subject:** thestar.com - More indigenous judges needed in lower courts to develop skills for Supreme Court

More indigenous judges needed in lower courts to develop skills for Supreme Court

Beverley McLachlin

By: Tonda MacCharles

2016-08-10

OTTAWA-Canada's top judge says the best way to one day see an aboriginal person named to the Supreme Court of Canada is for governments to appoint more indigenous judges to lower courts.

In an exclusive interview with the Star, Chief Justice Beverley McLachlin said the country's highest court requires high-level judging and "considerable" judicial experience, and while she welcomes ethnic diversity and more aboriginal judges in the system, she suggested they must work their way up.

She said the challenge for aboriginal aspirants to the high court is the same that women faced three or four decades ago when there were "virtually no women on the bench. And so how did the government go about changing that to the point now where we're four women on the Supreme Court of Canada? They started appointing people at the trial level.

"But the difficulty we have with racial minorities, indigenous people is that we're just beginning this process of getting the judges in place on the trial benches and so on."

The federal government has launched a new judicial selection process, striking an independent advisory board to recommend candidates to fill the top court vacancy announced in March by retiring Justice Thomas Cromwell, of Nova Scotia, who steps down at the end of August.

Trudeau wants the seven-member advisory board to recommend jurists "of the highest calibre" who must be functionally bilingual and "representative of the diversity" of Canada.

The new process has again shone a light on the lack of diversity in Canada's judicial ranks.

McLachlin was consulted by the government as it devised the new selection process. She will also be consulted by the advisory board as it canvasses for Cromwell's replacement. She was careful not to express an opinion on the government's changes, saying reforms to judicial selection for greater transparency have been an ongoing project, and it is up to the government to set its criteria, including the bilingualism requirement. "I'm not about to comment on that because it's not my business."

However, she did endorse the functional bilingualism prerequisite as "desirable" even though she herself was not fully, functionally bilingual when first appointed in 1989 to the Supreme Court of Canada by then-Prime Minister Brian Mulroney. That came after she actually started working in the law in French, she said.

Most of the judges at the top court are "completely bilingual now and those who might lack something are working very hard to improve their skill and the court works very well this way," she said.

Let me put it this way. It's possible for the court to function without everyone being bilingual. We've done it in the past and I think we've done our job well. However, I believe that functional bilingualism is very helpful and desirable."

But the question of diversity on the court is more complicated.

McLachlin pointed to her own experience. She was first appointed to the County Court of Vancouver "where I thought maybe that's where I'd spend the rest of my days. And then I worked my way up through the trial court and through the court of appeal, and finally to the Supreme Court of Canada."

Now women make up about 35 per cent of Canadian judges, she said. "We've been able to achieve a significant measure of diversity on the gender front and," she stressed, "have judges who are reflective of this high calibre of judicial experience, intellectual experience and judgment and familiarity with the law and judging. So we've been able to have it all."

McLachlin is encouraged by "a host of very accomplished indigenous lawyers and professors" who she said are the result of proactive programs in law schools and universities and better educational standards. However, she did not suggest any of those are in a position to be vaulted onto the top bench from the bar, as has been the case with some Supreme Court judges in the past: Suzanne Côté, Ian Binnie, John Sopinka.

Asked if there are any current sitting aboriginal judges that could sit on the high court, McLachlin dodged.

"I can't say; I haven't done a survey. We'll see who applies, and what comes of it."

Osgoode Hall law dean Lorne Sossin said while bilingualism is an asset that should be encouraged and supported, to make it a requirement effectively acts as a barrier to many talented aboriginal candidates and others from Southeast Asian, and East Asian communities.

He said "the government's heart and mind is in the right place" because it seeks to boost transparency and diversity, but he asks why the ability to speak an indigenous language isn't viewed as an asset for a court that remains "remarkably homogeneous."

Sossin wrote Tuesday in Policy Options that "Canada has never had Supreme Court justice who is indigenous, who is from a visible minority, who has a religious background that is not Christian or Jewish, or who self-identifies as other than heterosexual. Suffice it to say, the Supreme Court of 2016 simply does not reflect the Canada of 2016 - not even approximately."

Most people agree appointments should be based on merit but Sossin says "the concept of merit signifies different things to different people."

"For some, it can be measured objectively (for example, academic degrees, career achievements, and demonstrated legal expertise). For others, it can also encompass more holistic aspects of a potential jurist, such as empathy, imagination, humility, resilience and interpersonal/intercultural skills. But where do gender, race, ethnicity, age, sexual orientation, religion, culture and life experience fit into these understandings of merit?"

In an interview, Sossin said "unquestionably" there are indigenous candidates in Canadian courts, law faculties and in law practice that "the government could appoint that could both enhance the quality of the (Supreme) court, its stature and its expertise and at the same time see the first member of an indigenous community appointed to the court. Absolutely. But I don't think the bilingualism requirement assists in that process."

On the other hand, he said, an aboriginal appointment to the high court would not merely "tick a box on diversity and inclusion" - it would bring much needed perspective on indigenous law and treaties that are a fundamental aspect of the Constitution, "one that we've always had to interpret because we've never had anyone who can speak in a first-person understanding of the language and culture from which those treaties emerged."

<http://ww2.infomedia.gc.ca/justice/2016/08/10/202086794>

**SUPREME COURT APPOINTMENTS PROCESS**  
**QUESTIONS AND ANSWERS – AUGUST 11 TORONTO STAR ARTICLE**

**These Qs & As address some of the issues raised in the August 11 Toronto Star article entitled “Urgent need for judicial vacancies to be filled promptly: Beverley McLachlin”.**

**Chief Justice Beverly McLachlin has indicated that current judicial vacancies are making it very difficult for superior courts to comply with the constitutional requirement that people be tried within a reasonable time. When is the Government going to act to fill these vacancies (44 as of August 1, 2016)?**

- I am sensitive to the pressures being experienced in courts throughout the country due to judicial vacancies. I look forward to making progress on this front in the near future.
- The Government announced 15 appointments to trial and appellate courts in mid-June, and soon will be moving forward with further steps, both to strengthen the process and to fill remaining vacancies.
- One of the challenges is that the process can never be “paused”: vacancies continue to accumulate, even while measures to strengthen the process are being considered.
- The Government has committed to increasing transparency, accountability and diversity in superior court judicial appointments, and I look forward to publicly announcing our intentions in this regard very soon.



**The Canadian Bar Association (CBA) has written to you and the Prime Minister urging the Government to respect the longstanding custom of regional representation on the Supreme Court of Canada. Will the Government commit to ensuring that the current Atlantic Canada vacancy is filled by a meritorious candidate from that region?**

- I respect the Canadian Bar Association's perspective on this issue. I am very pleased that the Independent Advisory Board for Supreme Court of Canada Judicial Appointments includes a member nominated by the CBA. Representation from legal organizations like the CBA will provide critical input in assessing the qualifications of candidates.
- I acknowledge that there has been a practice of distributing the positions on the Supreme Court regionally. Our Government values the importance of ensuring a regional balance on the Court and will seek to maintain it. However, we also want to ensure that the very best candidate is identified, based on the needs of the Court, each time a vacancy arises, regardless of where in Canada they are from.
- For this and future vacancies, we expect exceptional jurists from across the country to apply, including from Atlantic Canada.
- Given that Justice Cromwell is from Nova Scotia, the Prime Minister has requested the Advisory Board to include candidates from Atlantic Canada on the shortlist it develops.

thestar.com

## Urgent need for judicial vacancies to be filled promptly: Beverley McLachlin

Supreme Court of Canada Chief Justice Beverley McLachlin linked the number of empty seats on federally appointed court benches across the country — 44 at the moment — to unacceptable trial delays, especially in the criminal courts.



In an exclusive interview with the Star, Chief Justice Beverley McLachlin said judicial vacancies make "it very, very difficult to comply with the constitutional requirement that people be tried within a reasonable time." (FRED CHARTRAND / FOR THE TORONTO STAR)

By TONDA MACCHARLES Ottawa Bureau reporter  
Thu., Aug. 11, 2016

OTTAWA—Canada's top judge says the Liberal government could look to the shortlists of judges vetted under the former Conservative government to address a long-standing problem with judicial vacancies.

In an exclusive interview with the Star, Supreme Court of Canada Chief Justice Beverley McLachlin linked the number of empty seats on federally appointed court benches across the country — 44 at the moment — to unacceptable trial delays, especially in the criminal courts.

McLachlin said she has no argument with the Liberal government's effort to overhaul judicial appointment processes across the country, but said "I hope we can find a way to bridge the gap while we're perfecting the processes — but that's in the government's hands, properly, under our Constitution."

Asked what options might bridge that gap, McLachlin emphasized "it's not for me to tell the government how to appoint judges. That's not my business. But there are names, I understand, that are in the system from the previous (judicial advisory) committees."

She said it is the current government's "prerogative to appoint in accordance with their processes" but added there is a pressing need for vacancies "be filled in a prompt manner."

McLachlin made clear there is a lot at stake for the justice system, saying the vacancies are "a huge difficulty. It's more than a challenge. It makes it very, very difficult to comply with the constitutional requirement that people be tried within a reasonable time," she said in an interview at her office west of Parliament Hill.

McLachlin pointed to the Supreme Court's July ruling in a case called *R. vs. Jordan*, a split 5-4 decision in which she dissented.

In the interview, she said the court addressed the "lamentable delays" in criminal trials. She said the decision was clear that "we have to have strict compliance with the constitutional right of people to be tried within a reasonable time," adding that "this is going to be a challenge for the justice system in the years to come."

The majority ruling warned past approaches to how the courts considered delays — based in part on the high court's own rulings on issues of procedural fairness — have created a "culture of delay and complacency."

It set out a new framework that set limits on how long the justice system should reasonably take from the laying of a criminal charge to the actual or anticipated end of a trial. Otherwise criminal charges may be stayed under an accused person's charter guarantee of a trial within a reasonable time. Only under "exceptional circumstances" should trials be prolonged, it ruled. At most, the Supreme Court said provincial court cases should take 18 months, and for cases in superior trial courts (including those heard in provincial court after a preliminary inquiry) the outside limit is 30 months. Delay caused by or waived by the defence doesn't count. But the Supreme Court says trial delays beyond these times will be presumed to be unreasonable unless there are "exceptional" reasons that were unforeseen and couldn't be prevented or remedied by Crown action.

"I can tell you because I talk to the chief justices who are trying to get the cases tried within reasonable time that they need more judges," said McLachlin, who chairs the Canadian Judicial Council of chief trial and appellate judges.

McLachlin said she first started expressing concern about empty seats on Canada's courts in 2006 when "I think there were 35 vacancies and I said that was unacceptable at the time, and today there are — how many? — 41?"

In fact, the Office of the Commissioner for Federal Judicial Affairs said as of Aug. 1 there are 44 vacancies on the federally appointed benches across Canada. The Conservative government was often accused of dragging its feet to replace judges. But since its election last October, the federal Liberal government has moved very slowly to fill gaps.

Joanne Ghiz, spokesperson for Justice Minister Jody Wilson-Raybould, said the minister was unavailable for an interview but in an email she pointed to 15 judicial appointments made in June.

Only eight of those appointments were new judges; seven of them were sitting judges who shifted from one bench to another.

Ghiz said the government moved to fill "urgent judicial vacancies by drawing on existing lists of recommended candidates" but is still "considering ways" to significantly reform the judicial appointments process.

She offered no indication of when the vacancies would be filled. Ghiz said significant reforms will "take time, and require appropriate consultations, including with the judiciary, the legal community and the general public."

McLachlin said while she respects the desire of the new government to revise appointment procedures, "We have Canadians who have a constitutional right to a trial within a reasonable time and we don't have enough judges in place in some parts of the country to deliver that. So my hope is that we can have both things, that it's not either a new, revised or better process or denying Canadians their constitutional rights."

The Liberal government's overhaul of all federal order-in-council appointments includes judicial appointments not only at the trial and appellate level in provincial courts, but at the very top.

It unveiled a new process to pick a new judge for the Supreme Court of Canada week to fill a vacancy it has known about since March. That's when Justice Thomas Cromwell, of Nova Scotia, announced he would retire at the end of August. A new advisory board charged with coming up with a shortlist has until Sept. 24 to deliver candidate names to Prime Minister Justin Trudeau. The high court's fall session starts in October.

"Ideally, the (Supreme) court should have all nine people and the court functions best when it has nine people," McLachlin said, adding it has operated at less than the full nine-member bench before.

But in those cases, appeals involving legal issues of national interest and scope are heard with seven instead of nine judges. "Some judges may not be able to participate in all the cases they'd like to," she said. "I have a rule that if you really want to sit on it you can, but if we sit eight and we divide evenly, then there are other problems."

A "couple of times" the court has ordered a rehearing of an appeal or when a new judge is appointed he or she participates "after the fact via video" with the consent of the parties.

"There are ways of working around it. The bottom line is that it's very important to have nine judges in place. I'm sure the government appreciates this and that they are committed to making an appointment at the very earliest possible time."

Trudeau's government has tossed aside a convention that would see Cromwell's replacement chosen from Atlantic Canada, and invited applicants from across the country, while introducing a requirement that top court applicants be "functionally bilingual." That requirement has irked judges and the legal community in Newfoundland and Labrador, which had been expecting the province's turn had come for a Supreme Court appointment. At least seven senior

judges in that province have French-language training with varying degrees of proficiency, contrary to reports that none speak French.

On Wednesday, the Canadian Bar Association, which represents 36,000 lawyers, judges, law teachers and students, released a letter it wrote to Trudeau calling on the government to change its mind.

It said the Atlantic Canada vacancy on the high court should be "filled by a meritorious candidate from that region" and future vacancies should respect the custom of allotting seats on the high court on a regional basis.

By law, three of the Supreme Court's nine seats are reserved for Quebec, and by tradition, the federal government appoints three judges from Ontario, two from the West, and one from Atlantic Canada.

**Read more about:** Justin Trudeau



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

Office of the President  
Cabinet de la présidente

August 10, 2016

Via email: [justin.trudeau@parl.gc.ca](mailto:justin.trudeau@parl.gc.ca); [mcu@justice.gc.ca](mailto:mcu@justice.gc.ca)

The Right Honourable Justin Trudeau, P.C., M.P.  
Prime Minister  
Langevin Building  
80 Wellington Street  
Ottawa, ON K1A 0A2

The Honourable Jody Wilson-Raybould, P.C., M.P.  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8

Dear Prime Minister and Minister of Justice:

**Re: Supreme Court of Canada Appointments**

In recent days there has been commentary about the selection criteria for appointment to the Supreme Court of Canada, including perceptions that the government has signaled a departure from the longstanding custom or constitutional convention of regional representation on the Court, by inviting applications from across Canada to fill the vacancy occasioned by the retirement of Justice Cromwell of Nova Scotia. I am writing to urge the government to ensure that the membership of Canada's highest court embraces all aspects of Canada's diversity, including respect for that custom or convention.

Canada is a large and varied country, with a strong commitment to an independent and impartial judiciary, multiple legal traditions and strong values. The Canadian Bar Association firmly believes that appointments to the Supreme Court of Canada should be based on merit, ensuring that our judiciary reflects the full diversity of our regions, legal systems and population.

Our highest court must continue to represent all regions of Canada, including Atlantic Canada. Consequently, we urge you to amend the mandate of the Advisory Board outlined in your August 4, 2016 letter, to ensure that the Atlantic Canada vacancy is filled by a meritorious candidate from that region. We also urge you to honour regional representation in filling future vacancies on Canada's highest court.

The CBA welcomes selection processes that are accessible and transparent and that genuinely open the doors to more candidates, not just for the Supreme Court of Canada, but for all courts. It is only through such processes that Canadians will have confidence that the best candidates have been considered.

The CBA further encourages the government to consult with provincial and territorial attorneys general, chief justices and the bar to ensure that opportunities are identified to encourage the full participation in the selection process of qualified candidates from regions and communities.

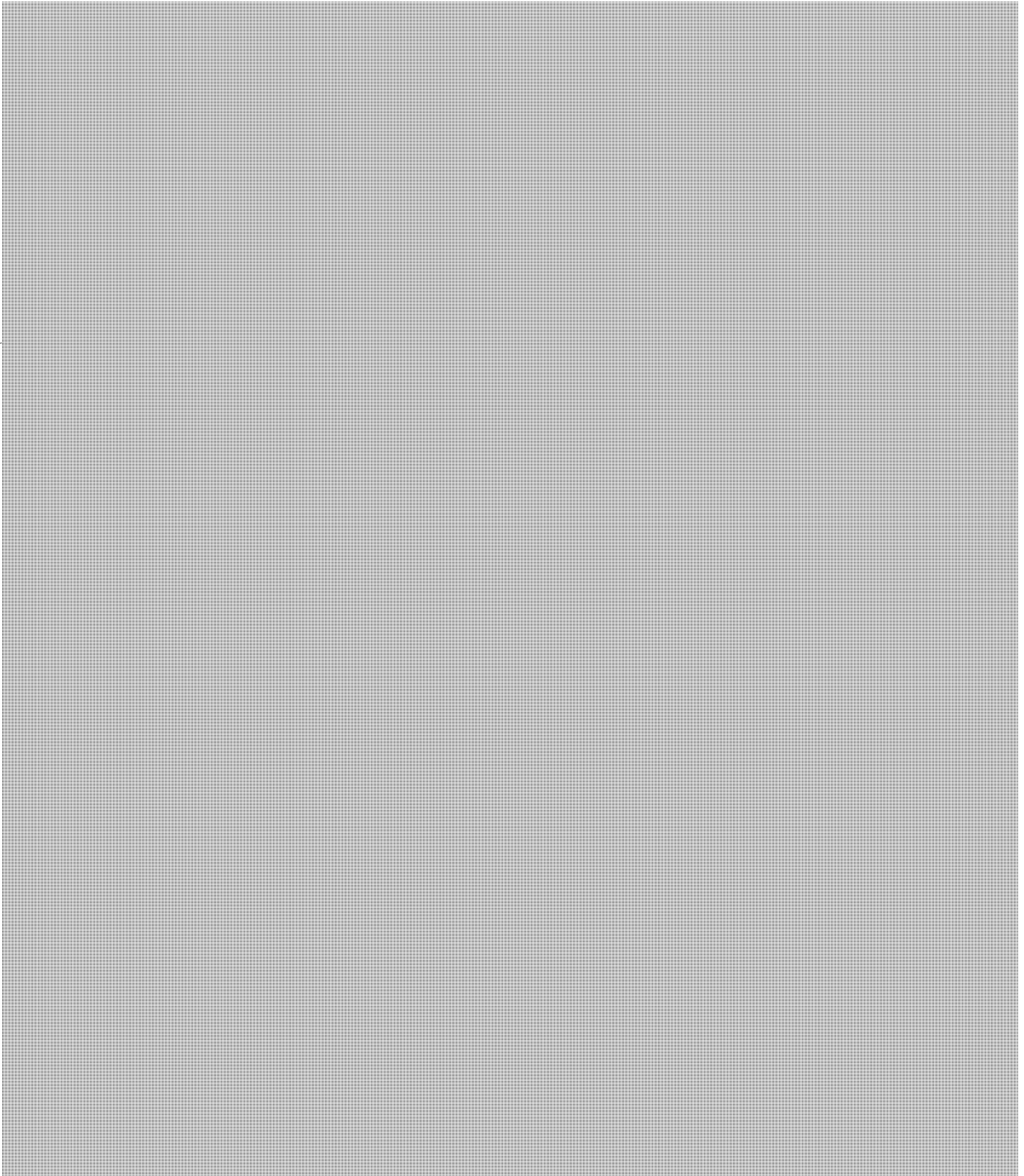
Yours truly,

*(original signed by Janet M. Fuhrer)*

Janet M. Fuhrer

s.21(1)(a)

**SUPREME COURT APPOINTMENTS PROCESS**  
**QUESTIONS AND ANSWERS – AUGUST 10 TORONTO STAR ARTICLE**



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Office of the  
Prime Minister



Cabinet du  
Premier ministre

Ottawa, Canada K1A 0A2

# Key Messages

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2 August 2016

## Issue: Supreme Court of Canada appointment process

- The decisions of the Supreme Court of Canada affect us all – they influence our economy, our cultural mores, and our definition of our individual and collective rights and responsibilities.
- But the process used to appoint Supreme Court justices is opaque, outdated, and in need of an overhaul.
- That is why, today, our government is announcing a new Supreme Court appointment process that is open, transparent, and will set a higher standard for accountability.
- Under the new process, an independent and non-partisan Advisory Board has been given the task of identifying suitable candidates who are
  - jurists of the highest caliber;
  - functionally bilingual; and
  - representative of the diversity of our great country.
- The seven-member Advisory Board, chaired by former Prime Minister Kim Campbell, includes four members nominated by independent professional organizations, and will submit a shortlist of three to five individuals for consideration by the Prime Minister.
- For the first time, any qualified Canadian lawyer or judge may apply for appointment to the Supreme Court of Canada.
- To increase transparency, the members of the independent Advisory Board, the assessment criteria, the questionnaire that all applicants must answer, and certain answers provided to the questionnaire by the Prime Minister's eventual nominee will all be made public to Canadians.
- The Minister of Justice and the chair of the Advisory Board will appear before Parliament to discuss the selection process. A number of Members of Parliament and Senators – from all parties – will also have the opportunity to take part in a Q&A session with the eventual nominee, before she or he joins the bench.

# NEW PROCESS FOR JUDICIAL APPOINTMENTS TO THE SUPREME COURT OF CANADA

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Ottawa, Ontario  
2 August 2016

The Government of Canada is committed to ensuring that the process of appointing Supreme Court of Canada Justices is transparent, inclusive, and accountable to Canadians. To deliver on this commitment, an independent and non-partisan advisory board has been created that will recommend qualified, functionally bilingual candidates who reflect a diversity of backgrounds and experiences for appointment to the Supreme Court of Canada.

## **How to apply to be considered for an appointment**

Applications for a position on the Supreme Court of Canada, that will become vacant in September with the retirement of the Honourable Justice Cromwell, are now being accepted. Qualified lawyers and persons holding judicial office from across Canada who wish to be considered for this vacancy must apply to the Independent Advisory Board for Supreme Court of Canada Judicial Appointments through the Office of the Commissioner for Federal Judicial Affairs. Those interested in applying are encouraged to first review the statutory requirements set out in the *Supreme Court Act*, as well as the Statement of Qualifications and Assessment Criteria that will guide the Advisory Board in evaluating candidates' suitability. Applicants will need to complete and submit an application package that includes a questionnaire, an authorization form, and a background check consent form. The deadline to submit an application package is no later than 23:59 Pacific daylight time on August 24, 2016.

## **The Independent Advisory Board for Supreme Court of Canada Judicial Appointments**

The seven-member Independent Advisory Board for Supreme Court of Canada Judicial Appointments includes four members who have been nominated as follows:

- A retired judge nominated by the Canadian Judicial Council;
- Two lawyers, one nominated by the Canadian Bar Association and the other by the Federation of Law Societies of Canada; and
- A legal scholar nominated by the Council of Canadian Law Deans.

The other three members, including two non-lawyers, have been nominated by the Minister of Justice.

The Right Honourable Kim Campbell has been designated as the Chairperson of the Advisory Board. All members have been appointed to renewable terms of six months.

The Advisory Board's mandate is to provide recommendations for a position that will become vacant on September 1, 2016 with the retirement of the Honourable Justice Cromwell.

The Advisory Board will consider applications received through the Office of the Commissioner for Federal Judicial Affairs. Part of the Advisory Board's work will be to actively seek out qualified candidates and encourage them to apply. The Advisory Board will consult with the Chief Justice of the Supreme Court of Canada and other key stakeholders the Board considers appropriate. The statutory

requirements and the publicly-available criteria will guide the work of the Advisory Board. The Advisory Board will only recommend candidates who are functionally bilingual.

Members of the Advisory Board will be expected to observe the highest standards of impartiality, integrity, and objectivity in their consideration of all candidates.

In establishing a list of qualified candidates, the Advisory Board will also seek to support the Government of Canada's intent to achieve a Supreme Court of Canada that is gender-balanced and reflects the diversity of members of Canadian society.

The Advisory Board will provide the Prime Minister with non-binding, merit-based recommendations of three to five qualified and functionally bilingual candidates for consideration. The Advisory Board will also provide an assessment of how each candidate meets the statutory requirements and the extent to which they meet the publicly-available criteria.

The Minister of Justice will consult on the shortlist of candidates with the Chief Justice of Canada, relevant provincial and territorial attorneys general, relevant cabinet ministers, opposition Justice Critics, as well as members of the House of Commons Standing Committee on Justice and Human Rights, and the Standing Senate Committee on Legal and Constitutional Affairs. Following these consultations, the Minister of Justice will present recommendations to the Prime Minister who will then choose the nominee.

Within a month of the judge being appointed, the Advisory Board will submit a report that outlines how it fulfilled its mandate, including costs related to its activities and statistics related to the applications received. The Advisory Board may also use the report to make recommendations for improving the process. To ensure transparency and accountability, the report will be made public.

#### **Participation by Members of Parliament and Senators**

To further enhance transparency and accountability, opportunities will be provided for Members of Parliament and Senators to participate in this appointments process.

At the outset, the Minister of Justice will be available to appear before the House of Commons Standing Committee on Justice and Human Rights to explain the new appointments process, as well as the criteria which will guide the work of the Advisory Board.

Once the Prime Minister has chosen the nominee, the Minister of Justice and the Chairperson of the Advisory Board will appear before the House of Commons Standing Committee on Justice and Human Rights to explain how the chosen nominee meets the statutory requirements and the criteria. Further to the committee hearing, the nominee will also take part in a moderated question and answer session with members of the House of Commons Standing Committee on Justice and Human Rights, the Standing Senate Committee on Legal and Constitutional Affairs, and representatives from the Bloc Québécois and the Green Party.

# PRIME MINISTER ANNOUNCES NEW SUPREME COURT OF CANADA JUDICIAL APPOINTMENTS PROCESS

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Ottawa, Ontario  
2 August 2016

Today, the Prime Minister, Justin Trudeau, announced a new process for appointing Supreme Court of Canada Justices that is open, transparent, and sets a higher standard for accountability.

Under the new process, an independent and non-partisan Advisory Board has been given the task of identifying suitable candidates who are jurists of the highest caliber, functionally bilingual, and representative of the diversity of our great country.

For the first time, any qualified Canadian lawyer or judge may apply for appointment to the Supreme Court of Canada through the Office of the Commissioner for Federal Judicial Affairs.

The seven-member Advisory Board, chaired by former Prime Minister Kim Campbell, includes four members nominated by independent professional organizations. The Advisory Board will review candidates who apply and will submit a shortlist of three to five individuals for consideration by the Prime Minister.

To enhance transparency, the assessment criteria guiding the Advisory Board, the questionnaire that all applicants must answer, and certain answers provided to the questionnaire by the Prime Minister's eventual nominee, will all be made public.

The Minister of Justice and the chair of the Advisory Board will appear before Parliament to discuss the selection process. A number of Members of Parliament and Senators – from all parties – will also have the opportunity to take part in a Q&A session with the eventual nominee, before she or he is appointed to the Supreme Court of Canada.

Fundamentally, this process will demonstrate a degree of rigor and responsibility that Canadians expect from their government.

## Quote

"The Supreme Court of Canada is respected nationally and internationally for its excellence—it is recognized as a model of a strong, independent judicial institution. This is due in no small part to a tradition of appointing only the most exceptional and impressive individuals to the court. We are committed to maintaining this tradition—and improving on it—by introducing an open, transparent and non-partisan process that will help ensure that the best, most well-qualified people reflective of Canadian society are named to Canada's top court."

– Rt. Hon. Justin Trudeau, Prime Minister of Canada

## Quick Facts

- The following members have been named to the Independent Advisory Board for Supreme Court of Canada Judicial Appointments:
  - The Right Honourable Kim Campbell – Chairperson – former Prime Minister of Canada and Canadian Consul General, and currently the Founding Principal of the Peter Lougheed Leadership College at the University of Alberta

- Camille Cameron – member – Dean of the Schulich School of Law at Dalhousie University, and Chair of the Canadian Council of Law Deans
  - Jeff Hirsch – member – President of the Federation of Law Societies of Canada, and partner with a Winnipeg law firm
  - Stephen Kakfwi – member - former Premier of the Northwest Territories and President of the Dene Nation, and currently working to improve the recognition and realities of Aboriginal peoples within Canada
  - Lili-Anna Pereša – member - President and Executive Director of Centraide of Greater Montreal
  - Richard J. Scott – member – former Chief Justice of the Manitoba Court of Appeal, and current counsel, arbitrator and mediator in a Winnipeg law firm
  - Susan Ursel – member – currently a senior partner with a Toronto firm, and Chair of the Canadian component of the African Legal Research Team which provides legal research support to Envisioning Global LGBT Rights
- 
- The application period ends on Wednesday, August 24.
  - Qualified lawyers and persons holding judicial office from across Canada who wish to be considered for the upcoming vacancy must complete and submit an application package no later than 23:59 Pacific daylight time on August 24, 2016.
  - Applications are now being accepted for the position that will become vacant in September with the retirement of the Honourable Justice Cromwell.

# Why Canada has a new way to choose Supreme Court judges

Justin Trudeau

Contributed to The Globe and Mail

Published Tuesday, Aug. 02, 2016 6:00AM EDT

Last updated Tuesday, Aug. 02, 2016 3:00PM EDT

The appointment of a Supreme Court of Canada justice is one of the most important decisions a prime minister makes.

Parliamentarians are responsible for shaping the laws that define the conduct of our citizens, but when there is disagreement about the application of those laws, it is up to our courts – and ultimately, the Supreme Court – to ensure that those laws are applied fairly and in accordance with our Constitution.

The top court's decisions affect us all – they influence our economy, our cultural mores and our definition of our individual and collective rights and responsibilities.

The nine women and men who sit on the Supreme Court bench must be jurists of the highest calibre, they must be functionally bilingual and they must also represent the diversity of our great country. As the current Chief Justice, Beverley McLachlin, once said: "If we are to fully meet the challenges of judging in a diverse society, we must work toward a bench that better mirrors the people it judges."

She is right: A diverse bench brings different and valuable perspectives to the decision-making process, whether informed by gender, ethnicity, personal history or the myriad other things that make us who we are.

Throughout our history, we have most often found, and been served by, the very best within our legal community. But the process used to appoint Supreme Court justices is opaque, outdated, and in need of an overhaul.

That is why, today, our government is announcing a new Supreme Court appointment process that is open, transparent and will set a higher standard for accountability.

First, we have opened the application process so that any Canadian lawyer or judge who fits the criteria can apply through the Office of the Commissioner for Federal Judicial Affairs.

Gone are the days of governments – Liberal and Conservative alike – nominating Supreme Court justices through a secretive backroom process. Canadians deserve better. From now on, an

independent and non-partisan advisory board will be given the task of identifying suitable candidates.

The board will be chaired by former prime minister Kim Campbell and will consist of seven members. Four will be designated by independent professional organizations: the Canadian Judicial Council, the Canadian Bar Association, the Federation of Law Societies and the Council of Canadian Law Deans; and the remaining three will be prominent Canadians, at least two of whom will be from outside the legal community, appointed by the Minister of Justice.

In future, when one of the three Quebec seats is to be filled, the composition of the advisory board will be adjusted to account for Quebec's unique legal tradition.

Second, we have committed to an unprecedented level of transparency. The members of the advisory board, the assessment criteria, the questionnaire that all applicants must answer and certain answers provided to the questionnaire by the Prime Minister's eventual nominee, will all be made public to Canadians.

Finally, members of Parliament will have the opportunity to actively participate in the appointment process and directly engage with the nominee – before she or he is appointed to the Supreme Court.

The Minister of Justice will appear before a House of Commons committee to explain the new selection process. Then, once the shortlist of candidates has been compiled by the advisory board, the minister will consult the Chief Justice of Canada, the applicable provincial and territorial attorneys-general, members of the House's justice and human rights committee, the Senate's legal and constitutional affairs committee, and the Opposition justice critics.

Once the nominee has been announced, participating MPs will be given a week to prepare for a special justice and human-rights committee hearing, where the Minister of Justice and the chair of the appointments committee will explain why the nominee was selected. To further meet our commitment to transparency, we will invite the members of the House and Senate committees, and representatives of all parties with seats in the House, to take part in a Q&A session with the nominee, moderated by a law professor.

For more than 140 years, Canadians have looked to their Supreme Court to provide wise counsel – to protect our rights while holding us each accountable to our responsibilities. And our court has served us well.

The changes our government announces today respect the court's central role in the administration of justice, while at the same time offering the kind of rigorous review that such an important decision demands.

By making the appointment process more open and transparent, Canadians can be reassured that all members of the Supreme Court are both fully qualified and fully accountable to those they serve.

The appointment of a Supreme Court justice is one of the most important decisions a prime minister makes. It is time we made that decision together.





Government  
of Canada

Gouvernement  
du Canada

Canada

## Office of the Commissioner for Federal Judicial Affairs Canada

Home > SCC Appointments > Frequently Asked Questions

### Frequently Asked Questions

#### Why is the Government changing the way that Supreme Court of Canada judges are appointed?

The Government believes that Canadians' well-founded confidence in our highest court will be reinforced by a selection process that is consistent with the independence of the judiciary while embodying the principles of openness, transparency, and accountability.

The Government is acting on its commitment to engage with all parties in the House of Commons to ensure that the process of appointing Supreme Court of Canada Justices is open, transparent, and sets a higher standard for accountability.

#### What is the new process for appointing Supreme Court of Canada judges?

The new process provides greater certainty, openness, independence, and objectivity for filling vacancies on the Supreme Court of Canada. Its key feature is a seven-member independent, non-partisan Advisory Board, which is tasked with identifying suitable candidates for appointment.

The Advisory Board will both receive and proactively seek out applications from interested candidates. Once the application period is over, it will consider applicants and develop a shortlist of three to five names. In assessing candidates, the Advisory Board will be guided by specific criteria that have been made public and which reflect the Government of Canada's commitment to ensure that Supreme Court of Canada nominees are jurists of the highest calibre, functionally bilingual, and representative of the diversity of this great country.

While the Advisory Board is undertaking its work, the Minister of Justice will appear before the House of Commons Standing Committee on Justice and Human Rights in order to explain the selection process that will guide the work of the Advisory Board.

Once the shortlist is finalized, the Minister of Justice will consult with the Chief Justice of Canada, relevant provincial and territorial attorneys general, relevant Cabinet ministers, opposition Justice Critics, as well as members of both the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs.

Based on these consultations and the Minister of Justice's recommendation, the Prime Minister will choose the nominee and publicly announce his or her name. The Minister of Justice and the Chairperson of the Advisory Board will then appear before the House of Commons Standing Committee on Justice and Human Rights to explain why the nominee was selected.

To further meet the government's commitment to transparency, members of the House of Commons Standing Committee on Justice and Human Rights, the Standing Senate Committee on Legal and Constitutional Affairs, and representative from all parties with seats in the House, will be invited to take part in a question and answer period with the eventual nominee. The meeting will be moderated by a law professor and it will provide an opportunity for Parliamentarians and members of the public to get acquainted with the future justice of the Supreme Court of Canada.

#### Who are the members of the Advisory Board?

The independent and non-partisan Advisory Board is composed of seven members. These are:

- a retired judge nominated by the Canadian Judicial Council;
- two lawyers, one nominated by the Canadian Bar Association and one by the Federation of Law Societies of Canada;
- a legal scholar nominated by the Council of Canadian Law Deans; and
- three members nominated by the Minister of Justice, at least two of whom are from outside the legal community.

Representation from the judiciary and the legal community on the Advisory Board will greatly aid in the assessment of the professional qualifications of candidates. The non-legal members - who are prominent and well respected Canadians - will help bring a diversity of views to the Advisory Board's deliberations.

The Government has carefully selected members with a view to ensuring gender balance, diversity (including linguistic diversity), and regional balance in the Advisory Board's composition. While not representing provinces or regions *per se*, the Advisory Board itself is regionally balanced, with members being drawn from different parts of Canada. Their role is to bring their diverse backgrounds and viewpoints to the ultimate goal of identifying the best candidates.

### **Are members of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments paid for their services?**

Independent Advisory Board for Supreme Court of Canada Judicial Appointments members are entitled to a per diem rate which is consistent with the Remuneration Guidelines for Part-Time Governor in Council Appointees in Agencies, Boards and Commissions. This per diem range is \$375-450 for members and \$550-\$650 for the Chairperson.

### **Are applications being accepted from across Canada despite the regional custom that the seat be occupied by a justice from Atlantic Canada?**

The Advisory Board will develop and submit to the Prime Minister a list of three to five qualified and functionally bilingual candidates that includes candidates from Atlantic Canada. Applications are being accepted from across Canada in order to allow for a selection process that ensures outstanding individuals are considered for appointment to the Supreme Court of Canada

### **Will the Supreme Court of Canada appointment process be modified in the event of a vacancy among the three Quebec court seats?**

In the future, when one of the three Quebec seats is to be filled, the composition of the Advisory Board will be adjusted to account for Quebec's unique legal tradition.

### **Will the new process politicize the appointments process?**

No. The new process will be consistent with the independence of the Supreme Court of Canada. It establishes an independent and non-partisan Advisory Board, tasked with identifying suitable candidates for appointment. Appointments will meet established criteria and will be made following a selection process that is open, transparent, and sets a higher standard for accountability.

### **Where did the criteria and questionnaire come from?**

The Government engaged the services of three legal academic experts to draft the criteria and questionnaire to be used for this process. These draft documents were produced by three members of the University of Ottawa's Public Law Group: Adam Dodek, Carissima Mathen and Charles-Maxime Panaccio – all of whom specialize in the areas of public and constitutional law.

### **The three most recent processes for appointing Supreme Court of Canada judges using a committee have included Members of Parliament. Why don't Members of Parliament have a role on the Advisory Board?**

The Government feels that the task of identifying suitable candidates for appointment should be given to an independent and non-partisan Advisory Board. That said, this new process provides many opportunities for Members of Parliament to be involved.

The Minister of Justice will first appear before the House of Commons Standing Committee on Justice and Human Rights to explain the new selection process. Then once the shortlist of candidates has been compiled by the Advisory Board, the Minister of Justice will consult with a wide range of stakeholders, including members of the House's Justice and Human Rights Committee, the Senate's Legal and Constitutional Affairs Committee, as well as the opposition justice critics.

Once the nominee is announced, participating MPs will be given a week to prepare for a special Justice and Human Rights committee hearing, where the Minister of Justice and the chair of the Advisory Board will explain why the nominee was selected.

Finally, members of the House of Commons Standing Committee on Justice and Human Rights, the Standing Senate Committee on Legal and Constitutional Affairs, and representative from all parties with seats in the House, will be invited to take part in a question and answer period with the eventual nominee. The meeting will be moderated by a law professor and it will provide an opportunity for Parliamentarians and members of the public to get acquainted with the future justice of the Supreme Court of Canada.

### **How many seats are you filling on the Supreme Court of Canada with this process?**

The Honourable Justice Cromwell will be retiring from the Supreme Court of Canada on September 1, 2016. The Government intends to fill the vacancy created by Justice Cromwell's impending retirement with this process, as well as any future vacancies that may arise.

### **Will the Government appoint only bilingual judges to the Supreme Court of Canada?**

The Government has committed to ensuring that those appointed to the Supreme Court of Canada are functionally bilingual.

### **What does "functionally bilingual" mean?**

As indicated in the criteria, the Supreme Court of Canada hears appeals in both English and French. Written materials may be submitted in either official language and counsel may present oral argument in the official language of their choice. Therefore, to be functionally bilingual, a Supreme Court of Canada judge should be able to read materials and understand oral argument without the need for translation or interpretation in French and English. It would be an asset if the judge can converse with counsel during oral argument and with other judges of the Court in French and English.

### **How will the Government ensure that those appointed are functionally bilingual?**

Candidates will first be called on to indicate in their application package their proficiency in both official languages. As well, the Office of the Commissioner for Federal Judicial Affairs may conduct individual assessments of some candidates to ascertain their understanding of written and oral arguments, as well as to determine whether candidates have the ability to speak in both official languages.

### **How will the new process prioritize diversity on the Supreme Court of Canada?**

The Government is committed to a selection process that ensures that outstanding individuals are appointed to the Supreme Court of Canada. The Government is also committed to ensuring that the Supreme Court of Canada, as an institution, is reflective of the diversity of Canadian society.

The fact that Canadian society is rich in diversity has important influences on the criteria that will be used at all stages of the selection process. This includes recognition that Supreme Court of Canada judges are called on to adjudicate complex legal questions between individuals and groups with a wide variety of experiences, backgrounds, and perspectives.

In addition, diversity within the Supreme Court of Canada itself is important for two main reasons. First, a diverse bench brings together different and valuable perspectives to the decision-making process, whether informed by gender, ethnicity, personal history, or the myriad of other things that make up who we are. Second, public institutions that reflect the diversity of the society they serve enhance public confidence and public acceptance of the institution as a whole. As such, the criteria specify that candidates are considered with a view towards ensuring that the members of the Supreme Court of Canada are reflective of the diversity of Canadian society.

### **Given the importance of aboriginal law to Canada's legal tradition, should the Government not appoint an Indigenous judge to the Supreme Court of Canada?**

The Government is committed to ensuring that the Supreme Court of Canada is reflective of the diversity of Canadian society.

Canada boasts a growing complement of outstanding Indigenous jurists, including judges, lawyers, and academics. Canadians from all communities – including Indigenous communities – are invited to encourage outstanding jurists to apply to become a Justice of the Supreme Court of Canada.

### **Will provinces and territories have any input into the selection of judges?**

Yes. There will be opportunities for consultation with provinces and territories during the selection process.

In assessing candidates and arriving at a shortlist, the Advisory Board is required to consult with the Chief Justice of the Supreme Court of Canada and any key stakeholders that they consider appropriate. This may include relevant provincial and territorial Ministers of Justice.

Furthermore, in considering the shortlist and prior to making her recommendation as to the preferred nominee, the Minister of Justice will consult with relevant provincial and territorial counterparts.

### **Can any qualified candidate apply from anywhere in Canada?**

Yes. The process is open to all qualified Canadians and is aimed at identifying the most outstanding candidate for the Supreme Court of Canada.

### **Will the shortlist created by the Advisory Board be made public?**

No. In establishing a careful balance between the competing principles of transparency and confidentiality, it was decided that the process should respect the reasonable privacy interests of candidates so that as many qualified candidates as possible will apply.

### **Is the Prime Minister bound to choose an individual from the shortlist?**

To ensure the Prime Minister's discretion to nominate an individual for appointment to the Supreme Court is not fettered, the shortlist will not be binding. The Prime Minister may request that the Advisory Board provide him with additional names of qualified, functionally bilingual candidates if necessary. However, it is the Government's intention to nominate an individual from the shortlist.

### **What happens if the House of Commons Standing Committee on Justice and Human Rights objects to a nominee?**

The role of the House of Commons Standing Committee on Justice and Human Rights is to hold the Government accountable for the selection it has made. The Prime Minister will review and consider any views of the Committee prior to making his final selection.

The constitutional and legislative framework vests the responsibility for appointing Supreme Court of Canada judges in the executive branch of the federal government. So as to not fetter the Government's discretion in discharging its role to select an individual for appointment to the Supreme Court of Canada, the committee's objection to a candidate would not be binding on the Prime Minister.

### **When does the Prime Minister expect to be in a position to appoint the nominee to the Supreme Court of Canada?**

It is anticipated that the appointment will occur during the Supreme Court of Canada's fall session.

### **What will the report of the Advisory Board to be filed within one month of the appointment contain?**



The Advisory Board report will contain information on how the mandate was carried out, including the steps undertaken in considering the applicants. It will contain all information about the costs (known at the time) related to the process. It will also include statistics relating to the number of applications received in a way so as not to identify any of the individual applicants. The Advisory Board report will be reviewed by the Government as it assesses the efficiency of this new process and whether any modifications are desirable for future vacancies.

## **Table of Contents**




- [The Independent Advisory Board for Supreme Court of Canada Judicial Appointments](#)
- [The Establishment of the Advisory Board](#)
- [Biographies of Members](#)
- [Terms of Reference of the Advisory Board](#)
- [Qualifications and Assessment Criteria](#)
- [How to Apply and Instructions](#)
- [Frequently Asked Questions](#)
- [Contact Persons for Candidates](#)

[Back to Top](#)

## **Features**

-  [Independent Advisory Board for Supreme Court of Canada Judicial Appointments](#)
-  [Number of Federally Appointed Judges](#)

## Links

-  [Canadian Judicial Council](#)
-  [Judicial Compensation and Benefits Commission](#)
-  [National Judicial Institute](#)

Date modified: 2016-08-02



Canada

## Office of the Commissioner for Federal Judicial Affairs Canada

Home > SCC Appointments > Qualifications and Assessment Criteria

### Qualifications and Assessment Criteria

#### *Qualifications*

The qualifications for appointment to the Supreme Court of Canada are set out in the *Supreme Court Act*, R.S.C. 1985, c. S 26. Section 5 provides that "Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province."

In order to be eligible for appointment to the Supreme Court of Canada, a candidate must be:

- (1) a current judge of a superior court of a province, including courts of appeal;
- (2) a former judge of such a court;
- (3) a current barrister or advocate of at least 10 years standing at the bar of a province; or
- (4) a former barrister or advocate of at least 10 years standing.

There are special rules for appointment of three judges from Quebec. Section 6 provides that "At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province." In the *Reference re Supreme Court Act, ss 5 and 6*, the Supreme Court stated that only current superior court judges (i.e. judges of the Court of Appeal of Quebec and the Superior Court of Quebec) and current members of the Quebec bar of at least 10 years standing are eligible for appointment to one of the three Quebec positions on the Supreme Court.

All judges of the Supreme Court must live in the National Capital Region or within 40 kilometres thereof. Candidates must either currently meet this qualification or undertake to move their residence, if appointed to the Supreme Court, in order to meet it.

#### *Functional bilingualism*

*The Government has committed to only appoint judges who are functionally bilingual.*

*The Supreme Court hears appeals in both English and French. Written materials may be submitted in either official language and counsel may present oral argument in the official language of their choice. Judges may ask questions in English or French. It is expected that a Supreme Court judge can read materials and understand oral argument without the need for translation or interpretation in French and English. Ideally, the judge can converse with counsel during oral argument and with other judges of the Court in French or English.*

#### Assessment Criteria

Judges of the Supreme Court of Canada face multiple, complex and occasionally competing expectations. In keeping with Canada's evolution into a mature constitutional democracy, the role of the courts, and the Supreme Court in particular, has become ever more important. The criteria for appointment to the Court must reflect both the needs of any court of final appeal, and the particular circumstances, history and context of Canadian society and its legal system. The criteria must facilitate the Court's ability to: resolve disputes between and among all manner of parties, communicate its decisions effectively to the Canadian public, uphold the constitution, and protect the rule of law.

Criteria for assessment may be grouped along two axes, one individual and the other institutional. Individual criteria relate to the skills, experience and qualities of candidates themselves. Particulars of legal training, of non-legal professional experience and of community involvement will vary greatly from individual to individual, but must be assessed to arrive at an evaluation of the candidate's potential for excellence in the judicial function. There are also numerous personal qualities that will bear on whether a

candidate has the appropriate judicial temperament. Institutional criteria will overlap to some degree with individual ones. But as the Court's composition shifts over time, particular needs may emerge as more necessary to enable the Court to perform its general and final appellate function in all legal areas.

Part of the selection process will involve determining the ways and degree to which particular candidates embody the skills, experience and qualities that best meet the Court's needs at a particular point in time. The selection process must retain an appropriate degree of flexibility.

### Personal Skills and Experience

#### 1. Demonstrated superior knowledge of the law.

*The chief consideration for any appointment is a person's ability to perform, and achieve excellence in, judging. At the Supreme Court, cases and references can arise in any legal area including public, private and international law. Judges must interpret and apply the governing statute and rules of the Supreme Court in a variety of proceedings relating to hearings, motions and appeals. Candidates for the Court must therefore possess deep knowledge of the law, in particular Canadian law. Knowledge of indigenous legal traditions may also be considered. This depth of skill may be acquired in a variety of ways: specialized legal training and study, professional practice, authoritative or scholarly legal writing and/or prior judicial experience.*

*The Supreme Court hears cases from matters under federal jurisdiction as well as from all provinces and territories, including Quebec, which follows a civil law tradition for most private law matters. Familiarity with the civil law tradition, therefore, is a strength for any candidate.*

#### 2. Superior analytical skills.

*A jurist must synthesize, distinguish, compare and contrast a variety of legal sources. They must efficiently determine which of the vast possible materials that constitute "the law" are most relevant to a specific legal question; and understand, weigh and resolve conflicts among those materials. An appellate judge must also review lower court decisions, determine appropriate grounds of appeal, distinguish between questions of fact and law and apply the suitable level of deference or correction. All of these are analytical functions requiring an exceptionally high degree of skill and discernment.*

#### 3. Ability to resolve complex legal problems

*The core function of the Supreme Court is to adjudicate legal disputes and to provide reasons explaining its decisions. As an adjudicator, a judge is not just required to hear a case, but to give an answer: to bring the matter to a legal conclusion. In appellate cases, resolution may be elusive as the issues tend to feature reasonably competing arguments. Nonetheless, a judge must be able to arrive at a sound decision, to support that decision with reasons and to provide the requisite certainty so that the instant dispute is resolved, and so that lower courts receive sufficient guidance to decide similar cases in the future.*

*Therefore, prior experience in adjudication is relevant though not essential. Adjudication can occur in many contexts, including administrative tribunals, arbitration bodies, and trial and appellate courts. As the Supreme Court is itself an appellate court, prior appellate judicial experience may be especially relevant but, again, is not essential for appointment.*

#### 4. Awareness of, and ability to synthesize information about, the social context in which legal disputes arise.

*A judge should demonstrate a general awareness of and an interest in knowing about the social problems that give rise to cases coming before the courts. They should be sensitive to changes in social values relating to the subject matter of cases before the Supreme Court. Many of the cases that the Supreme Court hears are not solely focussed on technical questions of law. Instead, they involve complex interactions between law and fact, particularly social facts that help to explain a law's purpose, the way that it tends to function and its effects on people or society as a whole. This interaction between law and social fact is most prominent in constitutional cases, but is not limited to them. A judge must therefore be able to receive evidence and argument about these social facts, or context, and use them to appropriately resolve the specific questions posed.*

#### 5. Clarity of thought, particularly as demonstrated through written expression.

*In most cases, the Supreme Court is expected to, and does, issue written reasons for its decisions. Decisions are the Court's most important method of communicating with parties, with courts, with other branches of government, and with the Canadian public. Reasons help to explain the basis for deciding complex legal issues one way versus another. Reasons also satisfy the Court's duty to provide guidance to the lower courts which are expected to apply those decisions in future cases. Excellence in written expression is thus essential to the Court's work, and a candidate's prior writing must be reviewed. Such writing can take a number of forms: judicial decisions, reports, memoranda of legal arguments, books, treatises and scholarly articles. The writing*

may be reviewed for, among other things, clarity, precision, command of the law, persuasiveness and balance. It is expected that the materials reviewed will primarily be legal in nature, though non-legal written expression may provide some assistance.

6. Ability to work under significant time pressures requiring diligent review of voluminous materials in any area of law.

*The Supreme Court hears appeals in all areas of law. Its nine members share a variety of adjudicative tasks. Cases at the Supreme Court often contain hundreds of pages of materials, and judges work on multiple cases at the same time. Judges must review materials in preparation for cases, review materials for decisions they are writing and review drafts and memos from their colleagues. The workload is heavy and constant. The job therefore requires significant stamina, industry and learning ability.*

7. Commitment to public service

*Judges are part of the community and fulfill an essential service to the public in addition to their constitutional role as impartial dispute arbiters. A demonstrated commitment to community engagement through involvement in community and volunteer organizations is a strength.*

### Personal Qualities

1. Irreproachable personal and professional integrity.

*The Supreme Court has noted: "The judge is the pillar of the entire justice system and of the rights and freedoms which that system is designed to promote and protect". Judges must themselves embody the ideals upon which the rule of law depends.*

*Canadians, thus, rightfully expect the highest level of ethical conduct from judges. As the Chief Justice of Canada has stated, "The ability of Canada's legal system to function effectively and to deliver the kind of justice that Canadians need and deserve depends in large part on the ethical standards of our judges." As noted by the Canadian Judicial Council's Ethical Principles for Judges, "Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law."*

2. Respect and consideration for others.

*The Supreme Court is a collegial court which is composed of nine judges who work and sit together day in and day out. Its judges deal with issues of the highest national importance. Their decisions are final and not subject to appeal to any other court in Canada. It is critical that each judge is able to work collaboratively with his or her colleagues and debate issues in a respectful and constructive manner. In addition, judges must be sensitive when dealing with persons in subordinate positions. It is expected that they will model the highest standards of professionalism, respect and courtesy.*

3. Ability to appreciate a diversity of views, perspectives and life experiences, including those relating to groups historically disadvantaged in Canadian society.

*Along with legal expertise, a judge will invariably draw on common sense and experience. It is, therefore, crucial that their perspective is neither too narrow nor resistant to change. A judge must have the capacity to empathize with persons who come from backgrounds that are very different from her own.*

4. Moral courage

*Judicial independence has been recognized as an unwritten constitutional principle under Canada's Constitution. It exists in order to protect the ability of judges to decide cases impartially, free of any external influence or coercion. Canadian judges enjoy a high degree of independence that is respected around the world. Nevertheless, Supreme Court judges sometimes face extremely challenging issues. They may be faced with making a decision that is at odds with the stated wishes of the government, with public opinion or with the views of their colleagues. This requires a measure of fortitude.*

5. Discretion

*Judges deal with sensitive and personal information. Their discussions are subject to deliberative secrecy and cannot be revealed. It is critical therefore that judges conduct themselves in a discreet fashion.*

6. Open-mindedness



*One of the most important qualities of a judge is the ability to maintain an open mind about any case that comes before him or her. To be clear, judges are not expected to operate as blank slates. The fact that a candidate has expressed an opinion on some issue that may one day come before the Court is not disqualifying. But a judge must be seen as able to weigh the evidence and argument in a particular case fairly and impartially, and to set aside any prior personal opinions when rendering a decision.*

### Institutional Needs of the Court

1. Ensuring a reasonable balance between public and private law expertise, bearing in mind the historic patterns of distribution between those areas in Supreme Court appeals.

*The Supreme Court of Canada is a general court of appeal for Canada which hears appeals in all subject areas from provincial and territorial courts of appeal, from the Federal Court of Appeal and from the Court Martial Appeal Court of Canada. According to the most recent statistics, approximately one quarter of the cases heard by the Supreme Court are criminal non-Charter cases, almost another fifth are criminal Charter cases, and another fifth are non-criminal constitutional/Charter cases. The Court hears other types of cases but the subject-areas just noted represent the most significant areas of the Court's workload.*

2. Expertise in any specific subject matter that regularly features in appeals and is currently underrepresented on the Court

*Because of its diverse caseload, the Court must have judges with a diversity of expertise in order to address particular subject matters that will arise. A vacancy on the Court may give rise to a need for expertise in a particular subject matter: e.g. criminal, administrative, federal or commercial law.*

3. Ensuring that the members of the Supreme Court are reasonably reflective of the diversity of Canadian society.



*Canada is one of the world's most diverse societies, but that diversity is not fully reflected in its institutions. The Supreme Court is the most important and recognizable symbol of the justice system. Having a Court that is reasonably reflective of Canadian diversity helps to ensure that, in any particular case, the Court can benefit from a range of viewpoints and perspectives. A reasonably reflective Court also promotes public confidence in the administration of justice as well as in the appointment process.*

### Table of Contents

- [The Independent Advisory Board for Supreme Court of Canada Judicial Appointments](#)
- [The Establishment of the Advisory Board](#)
- [Biographies of Members](#)
- [Terms of Reference of the Advisory Board](#)
- [Qualifications and Assessment Criteria](#)
- [How to Apply and Instructions](#)
- [Frequently Asked Questions](#)
- [Contact Persons for Candidates](#)

[Back to Top](#)

### Features

-  [Independent Advisory Board for Supreme Court of Canada Judicial Appointments](#)
-  [Number of Federally Appointed Judges](#)

### Links

-  [Canadian Judicial Council](#)

**PROTECTED B (once completed)**



## Questionnaire for the Supreme Court of Canada Judicial Appointment Process Summer 2016

### **IMPORTANT INFORMATION**

All candidates who wish to be considered for appointment as a Justice of the Supreme Court of Canada must complete this Questionnaire. In addition to the completion of this Questionnaire, all candidates must submit the attachments requested in PART 7, and PART 8, if applicable. In order for their Application Package to be considered complete, candidates must submit it by e-mail to the Office of the Commissioner for Federal Judicial Affairs (OCFJA) at the following address: [SCCBoard-ComiteCSC@fja-cmf.gc.ca](mailto:SCCBoard-ComiteCSC@fja-cmf.gc.ca). The Application Package will consist of the following documents sent in multiple e-mails in the manner indicated below:

- a completed Questionnaire, (the last page of which must be printed, signed, dated, scanned and returned with the Questionnaire)
- a completed Authorization Form, and
- a completed Background Check Consent Form

If possible, these first three documents should be sent in one e-mail.

AND, in separate e-mails:

- five decisions, legal documents or publications (see Part 7, Skills Assessment)
- relevant documentation (if applicable) (see Part 8)

**NOTE 1:** The subject line of all e-mails should read as follows: SSC Nomination Process - <Last Name, First Name>. (Ex. SCC Nomination Process - Doe, Jane)

**NOTE 2:** Candidates must provide their responses within the space provided within the Questionnaire, except as specifically provided above.

**Please DO NOT provide any of the following:** reference letters, photographs, separate *curriculum vitae*

**Please note:** It is strongly recommended that candidates inform themselves of any e-mail size restrictions that are imposed by their Internet Service Providers (ex. Courthouse-provided e-mail system, Rogers, Bell, etc.) as this may cause technical difficulties in transmitting large documents to OCFJA. If candidates experience technical difficulties when attempting to submit their Questionnaire, they should contact the FJA Service Desk (1-888-495-8849) for immediate assistance. OCFJA will issue a confirmation message to acknowledge receipt of all e-mails that are successfully received.

Additional information is available on the Office of the Commissioner for Federal Judicial Affairs Website.

### **PRIVACY NOTICE**

All information collected in an Application Package is collected by OCFJA for the Independent Board for Supreme Court of Canada Judicial Appointments (Advisory Board), pursuant to the authority conferred by the Order in Council establishing the Advisory Board. The personal information collected is used to support the Advisory Board's mandate to assess applications received from candidates and provide a list of qualified candidates to the Prime Minister for appointment as Justices of the Supreme Court of Canada. Personal information collected is protected in conformity with the Privacy Act. The personal information collected may be used and disclosed to other government institutions and organizations, including the Privy Council Office, the Department of Justice and the Office of the Prime Minister as well as to third parties, for the purposes of this assessment and the recommendation of candidates for appointment. Personal information collected may be used and disclosed for other purposes in conformity with the *Privacy Act*. In any other instance, personal information will only be used or disclosed with the consent of the individual.

While confidentiality will be maintained to the extent possible, if a candidate is chosen as the nominee of the Prime Minister, it is important to be aware of the fact that it is intended that at that time the information, including personal information, contained in PARTS 3, 4, 5, 6, 7 and 10 of this Questionnaire is to be disclosed to the public. The nominee will be asked to consent to the release of any personal information contained in those Parts prior to its release.

### **DEADLINE**

Only Application packages received by the deadline will be considered by the Advisory Board. It is the responsibility of candidates to ensure that their applications are complete and that all materials have been successfully delivered to the OCFJA no later than 23:59 Pacific Daylight Time on August 24, 2016. Late or incomplete application packages may not be considered by the Advisory Board.

## **PART 1 - PERSONAL INFORMATION**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ Phone Number: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Citizenship: \_\_\_\_\_

Gender: ☐ Male ☐ Female ☐ Other Official Language of Preference for Correspondence: ☐ English ☐ French

### **Self-Identification Regarding Diversity (Optional)**

In carrying out its work, the Advisory Board will seek to support the achievement of gender balance and a reflection of diversity of the member of Canadian society on the Court. You are encouraged to provide information about yourself that you feel would assist in this objective.

☐ Indigenous ☐ Visible Minority ☐ Ethnic/Cultural Group or Other ☐ Woman ☐ Disabilities ☐ LGBTQ2

## **PART 2 - REFERENCES**

List six (6) references, both legal and non-legal, with their contact information. Please DO NOT send reference letters. Please ensure in choosing your references that they are made aware that they *may* be contacted by the Advisory Board regarding your application and that, if contacted, they will need to be available.

### **PART 3 - STATUTORY QUALIFICATIONS**

**Bar Membership(s):**

*Bars, Call dates, Reason for cessation of bar membership (i.e. resigned, appointed to the bench, other) and date of reinstatement (if applicable).*

**Judicial Experience (if applicable):**

*(Include all dates of appointment)*

### **RESIDENCE**

*(Please confirm the following mandatory requirement statement)*

- ☐ The *Supreme Court Act* requires that all justices shall reside in the National Capital Region or within 40 kilometers thereof. I confirm that I either currently meet this requirement or that if appointed, I will move my residence to the National Capital Region or within 40 kilometers thereof.



## **PART 6 - PROFESSIONAL AND EMPLOYMENT HISTORY**

*Please include a chronology of work experience, starting with the most recent and showing employers' names and dates of employment. For legal work, indicate areas of work or specialization with years and, if applicable, indicate if they have changed.*

### **Legal Work Experience:**

### **Non-Legal Work Experience:**

### **Other Professional Experience:**

*(List all bar associations, legal or judicial-related committees of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.)*

**Pro Bono Activities:**

**Teaching and Continuing Education:**

*(List all legal or judicial educational organizations and activities you have been involved with (e.g. teaching course at a Law Faculty, National Judicial Institute, Canadian Institute for the Administration of Justice, etc)).*

**Community and Civic Activities :**

*(List all organizations of which you are a member and any offices held (with dates)).*

**Honours and Awards:**

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**PART 7 - LEGAL EXPERIENCE AND EXPERTISE**

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**List and explain your areas of legal expertise:**

**List and explain other legal areas that you have experience in:**



**List all reported cases where you appeared as counsel (excluding routine matters, consent orders etc):**

**Provide citations for all published decisions you have written (including as arbitrator, or in other decision-making capacities), including and noting concurrences and dissents:**

**List all publications, including online and opinion editorials, with dates and citations or links, if available:**

**List all presentations that you have given over the past 10 years (that are not included under Teaching and Continuing Education; e.g. presentations to members of the public, etc):**

## **SKILLS ASSESSMENT**

1- List and forward, in separate e-mails for each document, five decisions, legal documents (factums, etc) or publications that you have written that demonstrate your analytical skills, your ability to resolve complex legal problems and your excellence in legal writing. Provide, below, a synopsis of no more than 300 words for each decision/document/publication and explain your reason for selecting it.

Synopsis 1:

Synopsis 2:

Synopsis 3:

**Synopsis 4:**

**Synopsis 5:**

**2- Describe the five (5) most significant cases or matters that you dealt with while in legal practice or as a judge and how you dealt with them:**

## **SUPREME COURT OF CANADA EXPERIENCE**

List all cases in which you participated as counsel which were heard by the Supreme Court of Canada (appeals as of right, references and appeals by leave) and the result (include any pending cases). You may include significant participation in a case other than as named counsel (e.g. factum review committee). If so, describe precisely the nature of your participation:

List all Supreme Court of Canada leave applications in which you participated as counsel and their outcome (include any pending cases):

List all cases in which you participated as a judge which were heard by the Supreme Court (appeals as of right, references and appeals by leave) and the result (include any pending cases):

List all cases in which you participated as a judge where leave to appeal to the Supreme Court of Canada was requested or granted and their outcome (include any pending cases):

## **PART 8 - PERSONAL SUITABILITY AND INTEGRITY**

*For the questions below answer yes or no. If you answer yes to any questions, please provide a detailed explanation with any relevant documentation.*

1. Have you ever been disciplined by a Law Society, judicial council or other professional associations or regulatory body?

☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

2. Are you aware of any current outstanding complaints or investigations against you?

☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

3. Have you ever been the subject of any complaint to a Law Society, judicial council or other professional association or regulatory body? How was it resolved?

☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

4. Have you ever been found guilty of a criminal or other offence by a court or tribunal? Are you currently defending a charge for such an offence?

☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

5. Are you currently involved in litigation as a party or as an intervenor in your personal capacity or as part of a group? Do you foresee commencing or defending any litigation in the foreseeable future (i.e. because you have received a demand letter or you otherwise have notice of a possible claim against you or because you are aware of a possible claim that you have against another party)?

☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

6. Have you previously been involved in litigation as a party or as an intervenor in your personal capacity or as part of a group? ☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

7. Are you insolvent, in financial difficulties or subject to potential financial claims against you, your partners or any business you may have? ☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

8. Have you ever declared bankruptcy? ☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

9. Are you in arrears with taxes owed to a federal, provincial, territorial or municipal government?

☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

10. Are you in default of a family support obligation?

☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:

11. Is there anything in your past or present which could reflect negatively on yourself or the judiciary?

☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation:



## **PART 9 - HEALTH AND WELLNESS**

*The work of a Supreme Court of Canada Justice is extremely demanding and stressful. Candidates must be in sufficiently good health in order to successfully do the job without sacrificing their physical or emotional well-being. For the questions below answer yes or no. If you answer yes to any questions, provide a full explanation with any relevant documentation.*

1. Do you currently have, or have you had in the last 10 years, any serious physical or mental health problems? ☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation.

2. Do you currently have, or have you had in the last 10 years, any problems with addiction, including alcohol, drugs or gambling problems? ☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation.

3. Is there any impediment that could interfere with your ability to perform work as a Supreme Court Justice? ☐ Yes ☐ No

If you answered YES, provide a full explanation with any relevant documentation.

## **PART 10 - THE ROLE OF THE JUDICIARY IN CANADA'S LEGAL SYSTEM**

*The Government of Canada seeks to appoint judges with a deep understanding of the judicial role in Canada. In order to provide a more complete basis for evaluation, candidates are asked to offer their insight into broader issues concerning the judiciary and Canada's legal system. For each of the following questions, please provide answers of between 750 and 1000 words.*

**1. What would you regard as your most significant contribution to the law and the pursuit of justice in Canada?**

**2. How has your experience provided you with insight into the variety and diversity of Canadians and their unique perspectives?**

**3. Describe the appropriate role of a judge in a constitutional democracy.**

**4. Who is the audience for Supreme Court of Canada decisions?**

5. To what extent does the role of a Supreme Court of Canada Justice allow for the reconciliation of the need to provide guidance on legal questions of importance to the legal system as a whole with the specific facts of a case which might appear to lead to an unjust result for a party?

---

## **PART 11 - DECLARATIONS AND SIGNATURE**

---

I undertake to respect the confidentiality of the Supreme Court of Canada appointment process, including the contents of my application, any communications with the Independent Advisory Board, the Prime Minister's Office, the Privy Council Office, the Office of the Minister of Justice or the Office of the Commissioner for Federal Judicial Affairs in relation to this appointment process. ☐ Yes ☐ No

---

I acknowledge that there will be additional security checks for which I will be required to consent prior to being recommended by the Advisory Board. ☐ Yes ☐ No

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I acknowledge that it is my responsibility to ensure that my Application Package is complete, and that it includes all mandatory information and required supporting documentation, and that my failure to submit all required information may result in my candidacy not being considered. ☐ Yes ☐ No

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## **CERTIFICATION**

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I certify that the information set out by me in this Questionnaire and in any attachment submitted in association with my Application Package is true and correct. ☐ Yes ☐ No

---

Signature: \_\_\_\_\_

Date: \_\_\_\_\_



Government  
of Canada

Gouvernement  
du Canada

Canada

## Office of the Commissioner for Federal Judicial Affairs Canada

Home > SCC Appointments > Biographies of Members

### Biographies of Members

The Independent Advisory Board for Supreme Court of Canada Judicial Appointments (Advisory Board) is an independent and non-partisan body whose mandate is to provide non-binding merit-based recommendations to the Prime Minister on Supreme Court of Canada appointments. It was constituted on August 2<sup>nd</sup>, 2016 and consists of seven members.

The Advisory Board consists of the seven following members

#### **The Right Honourable Kim Campbell, Chairperson**

Nominated by the Minister of Justice

The Right Honourable Kim Campbell, P.C., C.C., O.B.C., Q.C., former Prime Minister of Canada and Canadian Consul General, and currently the Founding Principal of the Peter Lougheed Leadership College at the University of Alberta.

#### **Lili-Anna Pereša, Member**

Nominated by the Minister of Justice

President and Executive Director of Centraide of Greater Montreal.

#### **Stephen Kakfwi, Member**

Nominated by the Minister of Justice

Former Premier of the Northwest Territories and President of the Dene Nation, and currently working to improve the recognition and realities of Aboriginal peoples within Canada.

#### **Susan Ursel, Member**

Nominated by the Canadian Bar Association

Currently a senior partner with a Toronto firm, and Chair of the Canadian component of the African Legal Research Team which provides legal research support to Envisioning Global LGBT Rights.

#### **Jeff Hirsch, Member**

Nominated by the Federation of Law Societies of Canada

President of the Federation of Law Societies of Canada, and partner with a Winnipeg law firm.

#### **Richard J. Scott, Member**

Nominated by the Canadian Judicial Council

Former Chief Justice of the Manitoba Court of Appeal, and current counsel, arbitrator and mediator in a Winnipeg law firm.

#### **Camille Cameron, Member**

Nominated by the Council of Canadian Law Deans

Dean of the Schulich School of Law at Dalhousie University, and Chair of the Canadian Council of Law Deans.

The Right Honourable Kim Campbell, P.C., C.C., O.B.C., Q.C., Chairperson



The Right Honourable Kim Campbell served in 1993 as Canada's nineteenth and first female Prime Minister. Prior to becoming Prime Minister, she held various Cabinet positions, including Minister of State for Indian Affairs and Northern Development, Minister of Justice and Attorney General of Canada, Minister of National Defence, and Minister of Veterans Affairs. She was the first woman to serve as Canada's Minister of Justice and Minister of National Defence, as well as the first to serve as Minister of Defence of a NATO member country.

Ms. Campbell was the Canadian Consul General in Los Angeles from 1996 to 2000, and later taught at the Harvard Kennedy School of Government from 2001 to 2004. She was also Chair of the Council of Women World Leaders, and past President of the International Women's Forum. From 2004 to 2006, Ms. Campbell was Secretary General of the Club de Madrid, an organization of former presidents and prime ministers of which she is a founding member.

Since 2014, Ms. Campbell has devoted much of her time to serving as the Founding Principal of the new Peter Lougheed Leadership College at the University of Alberta. Ms. Campbell continues to speak on a wide variety of topics through her participation in the American Program Bureau and the National Speakers Bureau. She is a trustee of the International Centre for the Study of Radicalisation and Political Violence at King's College London, and serves on several corporate and non-profit boards, and advisory committees, including Equal Voice, a Canadian organization devoted to achieving gender parity in the Canadian House of Commons.

### Lili-Anna Pereša, Member

Born in Montréal, Lili-Anna Pereša is an engineer by training and graduated from the École Polytechnique de Montréal in 1987. Ms. Pereša also holds a graduate degree in management from McGill University, and a master's degree in political science from the Sorbonne in Paris. She has been President and Executive Director of Centraide of Greater Montreal since 2013.

Ms. Pereša first became a volunteer aid worker at the age of 25 when she accepted an assignment from World University Service of Canada to teach in Malawi. She later worked for Oxfam-Québec as a management consultant to Burkina Secours in Burkina Faso and, in 1994, she joined CARE Austria and worked in Croatia and Bosnia-Herzegovina.

Ms. Pereša directed several community and humanitarian organizations, including les petits frères des Pauvres, the YWCA of Montreal, and Amnesty International France, before serving as Executive Director of ONE DROP from 2009 to 2012.

She is a member of the Ordre des ingénieurs du Québec, the International Women's Forum, the Amies d'affaires, and the Advisory Committee for the 2017 Summit of the Mallet Institute. She is also a member of the National Executive Committee of the 2017 Governor General's Canadian Leadership Conference, a board member of the Domaine Forget, and the Mobile Giving Foundation Canada.

Ms. Pereša's involvement in humanitarian aid has earned her numerous distinctions, including the Mercure Leadership Germaine-Gibara Award at the 2016 Mercuriades, the Meritorious Service Award for Community Service from the Canadian Council of Professional Engineers, an honorary doctorate from the Université de Montréal, and being named a Fellow of Engineers Canada.

### Stephen Kakfwi, Member

Stephen Kakfwi is a former Premier of the Northwest Territories (NWT) and former President of the Dene Nation. Originally from Fort Good Hope, NWT, he represented the Sahtu riding in the NWT Legislative Assembly from 1987 until his retirement in 2003, serving the entire time as an elected member of the NWT Executive Council. He is the longest-serving Cabinet Minister in the territory's history.

Mr. Kakfwi is a popular public speaker known for his personal and moving insights on the residential school experience, and the importance of meaningful reconciliation. He founded Canadians for a New Partnership in 2014, a coalition of distinguished Canadians committed to strengthening the country through the creation of a new partnership between First Peoples and others in Canada. Mr. Kakfwi maintains a successful independent consulting practice advising on conservation, indigenous affairs, and resource and governance negotiations. Originally trained as a teacher, he currently serves as a mentor and advisor to the organization Dene Nahjo, and as a board member for Pearson College.

Mr. Kakfwi is a recipient of the Governor General's Northern Medal, and the National Aboriginal Achievement Award for public service. He is a celebrated singer-songwriter, and has been nominated for National Aboriginal Music Awards. Mr. Kakfwi lives in Yellowknife, NWT, with his wife. They have three children and four grandchildren.

### Susan Ursel, Member

Susan Ursel received her Bachelor of Laws from Osgoode Hall Law School in 1984. She received an award in civil litigation during the Bar Admission course, and was called to the Bar in 1986. She currently works as a senior partner with the Toronto law

firm of Ursel Phillips Fellows Hopkinson LLP, and serves as Chair of the Canadian component of the African Legal Research Team which provides legal research support to the multi-disciplinary project Envisioning Global LGBT Rights.

An experienced litigator, Ms. Ursel's work includes both arbitration/trial level work, and appellate advocacy. She practices in the areas of labour, employment, pay equity, employment equity, human rights, pensions, and benefits law. She has practiced at all court levels, including the Supreme Court of Canada, as well as extensively before labour boards, human rights tribunals, and arbitration boards.

Ms. Ursel is a member of the Ontario Bar Association, the Canadian Association of Labour Lawyers, and the Association of Human Rights Lawyers. She has also been a founding member or director of various groups and organizations, including the Coalition for the Reform of the Ontario Human Rights Commission, the Association of Human Rights Lawyers, the Foundation for Equal Families, the Feminist Legal Analysis Committee, the Gay and Lesbian Issues and Rights Committee of the Canadian Bar Association: Ontario (now the SOGIC of the Ontario Bar Association), and Pro Bono Law Ontario.

Ms. Ursel has received the Lifetime Achievement Award from Pro Bono Ontario in 2016, the Canadian Bar Association's Young Lawyer's Pro Bono Service Award in 1998, and the Canadian Bar Association's Sexual Orientation and Gender Identity Conference Hero Award in 2011.

### Jeff Hirsch, Member

Jeff Hirsch is the President of the Federation of Law Societies of Canada, and represents the Federation on the Action Committee on Access to Justice in Civil and Family Matters, where he is a member of the Steering Committee.

Called to the Bar in 1987, Mr. Hirsch practices as a partner with the Winnipeg firm Thompson Dorfman Sweatman LLP, primarily in the areas of administrative law, commercial litigation and professional negligence. Mr. Hirsch was selected for inclusion in the 2014, 2015 and 2016 editions of Best Lawyers in Canada for Administrative and Public Law. He has been, and continues to be, an advocate for enhancing Canadians' ability to access legal services and for effective, equal access to justice.

Mr. Hirsch was President of the Law Society of Manitoba from 2009 to 2010, and is a Life Bencher, having served from 2002 to 2010. He taught Remedies at the Faculty of Law at the University of Manitoba from 1995 to 2014 and, in 2017, he will return to Robson Hall as a sessional lecturer on access to justice.

### Richard Jamieson Scott, Member

Richard Jamieson Scott graduated from the University of Manitoba and was called to the Manitoba Bar in 1963. He practiced law from 1963 to 1985 with the Winnipeg law firm Thompson Dorfman Sweatman, was chairperson of the Civil Litigation Subsection of the Manitoba and Canadian Bar Associations from 1975 to 1978, and a member of the board of directors for Legal Aid Manitoba from 1976 to 1982. He was a Bencher of the Law Society of Manitoba from 1980 to 1984, and President from 1983 to 1984.

In 1985, Mr. Scott was appointed as a judge to the Court of Queen's Bench of Manitoba and, later that year, as Associate Chief Justice of the Court of Queen's Bench of Manitoba. In 1990, he was appointed Chief Justice of the Manitoba Court of Appeal.

Mr. Scott has also been an active member with the Canadian Judicial Council since joining in 1985. He was Chairperson of various committees (including the Judicial Independent Committee, the Special Working Committee on the Preparation of Ethical Principles for Judges, and the Judicial Conduct Committee) and served as the Council's First Vice-Chairperson.

After retiring as Chief Justice of Manitoba in 2013, Mr. Scott served as the Independent Chairperson of the Discipline Committee of the Manitoba Law Society, and as a counsel/arbitrator/mediator with the Winnipeg civil litigation firm of Hill Sokalski Walsh Olson. He has also been active with several charities, including the Legal Help Centre, the Manitoba Heart and Stroke Foundation, the Winnipeg Foundation, and Winnipeg Harvest.

### Camille Cameron, Member

Camille Cameron is Dean of the Schulich School of Law at Dalhousie University, and Chair of the Canadian Council of Law Deans. Prior to joining Dalhousie University, she was the Dean of Windsor Law School, and a professor at the University of Melbourne in Australia where she also served a term as Associate Dean and was Director of the law school's Civil Justice Research Group. Before beginning her academic career, Ms. Cameron worked in private practice for 10 years, specializing in civil litigation.

In 1996, Ms. Cameron's worked in Cambodia with a human rights group training lay criminal defenders and judges, and she has since been a consultant on similar judicial training projects in various countries, including Vietnam, Laos, Mongolia, China, Thailand, the Maldives, and Indonesia.

Ms. Cameron's research interests focus on class actions, litigation funding, access to justice and the administration of civil justice. She has presented on these and related topics at national and international conferences. She is a member of an international research collaborative group that has just completed a book on comparative class actions in common law and civil law systems. In 2015, she worked with the Federal Court of Australia to advise the Indonesian judiciary on that country's class action legislation.



Ms. Cameron has served as the Chair of the Board of Governors of Legal Aid Windsor, the Windsor Advisory Board of Community Legal Aid, and the Ontario Law Deans. She has also been a member of the Board of the Law Commission of Ontario, and a member of the Board of Directors of Hiatus House, a shelter for women and children in Windsor.

## Table of Contents




- [The Independent Advisory Board for Supreme Court of Canada Judicial Appointments](#)
- [The Establishment of the Advisory Board](#)
- [Biographies of Members](#)
- [Terms of Reference of the Advisory Board](#)
- [Qualifications and Assessment Criteria](#)
- [How to Apply and Instructions](#)
- [Frequently Asked Questions](#)
- [Contact Persons for Candidates](#)

[Back to Top](#)

## Features

-  [Independent Advisory Board for Supreme Court of Canada Judicial Appointments](#)
-  [Number of Federally Appointed Judges](#)

## Links

-  [Canadian Judicial Council](#)
-  [Judicial Compensation and Benefits Commission](#)
-  [National Judicial Institute](#)

Date modified: 2016-08-02

# MANDATE LETTER (CHAIR) - INDEPENDENT ADVISORY BOARD FOR SUPREME COURT OF CANADA JUDICIAL APPOINTMENTS

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Dear Madam :

I am writing to congratulate you on your appointment to the Independent Advisory Board for Supreme Court of Canada Judicial Appointments and to thank you for agreeing to be the Chairperson of the Advisory Board. I am also writing to initiate the process that will culminate with the Advisory Board providing me with advice on the selection of a potential candidate for the Court's upcoming vacancy resulting from Mr. Justice Cromwell's impending retirement. Your term is for a period of six months. I am enclosing the Mandate of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments and Terms and Conditions of Appointment of Members, which were annexed to the Order in Council establishing the Advisory Board.

The Advisory Board is composed of seven members: three members, at least two of whom are non-lawyers, nominated by the Minister of Justice; two practicing members of the bar in good standing nominated by the Canadian Bar Association and the Federation of Law Societies of Canada, respectively; a legal scholar nominated by the Canadian Council of Law Deans; and a retired superior court judge nominated by the Canadian Judicial Council.

I ask that the Advisory Board develop and submit to me, by no later than September 23, 2016, a list of three to five qualified and functionally bilingual candidates that includes candidates from Atlantic Canada, for my consideration for this position. In making your selection, I would ask that you consider the custom of regional representation on the Court as being one of the factors to be taken into consideration. In compiling this list, I ask that you observe the highest standards of impartiality, integrity and objectivity in your consideration of all candidates.

In evaluating all candidates, the Advisory Board will be guided by the qualifications set out in the *Supreme Court Act* as well as assessment criteria which I am enclosing with this letter.

The question of whether a candidate is functionally bilingual will be assessed by the Office of the Commissioner for Federal Judicial Affairs in accordance with established and objective criteria.

The Office of the Commissioner of Federal Judicial Affairs will contact you in the coming days to confirm next steps.

As you will appreciate, this process is sensitive and I expect that all information received in relation to candidates and in relation to Advisory Board discussions and proceedings will be kept strictly confidential during the process and after the Board has concluded its work.

Thank you for agreeing to be part of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments. I look forward to receiving your recommendations.

Sincerely,

Justin Trudeau

## Privy Council Office

Privy Council Office

[Share this page](#)**PC Number:** 2016-0693**Date:** 2016-07-29

Whereas the Government of Canada is committed to a transparent, inclusive and merit-based appointment process that identifies qualified candidates who reflect a diversity of backgrounds and experience for appointment as Justices of the Supreme Court of Canada;

Whereas an independent advisory board will provide non-binding, merit-based recommendations to the Prime Minister on Supreme Court of Canada judicial appointments, without interfering with the powers of the Governor in Council to appoint Justices of the Supreme Court of Canada on the recommendation of the Prime Minister;

And whereas the members of the independent advisory board are to be appointed by the Governor in Council, pursuant to paragraph 127.1(1)(c) of the *Public Service Employment Act*, as special advisers to the Prime Minister;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Prime Minister, establishes the Independent Advisory Board for Supreme Court of Canada Judicial Appointments, the mandate of which as well as the terms and conditions of appointment of the members are set out in the schedule to this Order.

Attendu que le gouvernement du Canada s'est engagé à mettre en place un processus transparent, inclusif et fondé sur le mérite afin de trouver des candidats qualifiés ayant une diversité d'expériences et de compétences en vue de nommer les juges de la Cour suprême du Canada;

Attendu qu'un comité consultatif indépendant fournira au premier ministre des recommandations non contraignantes fondées sur le mérite en ce qui concerne la nomination des juges de la Cour suprême du Canada sans porter atteinte au pouvoir du gouverneur en conseil de nommer les juges de la Cour suprême du Canada sur recommandation du premier ministre;

Attendu que les membres de ce comité doivent être nommés à titre de conseillers spéciaux du premier ministre par le gouverneur en conseil en vertu de l'alinéa 127.1(1)c) de la *Loi sur l'emploi dans la fonction publique*,

À ces causes, sur recommandation du premier ministre, Son Excellence le Gouverneur général en conseil constitue le Comité consultatif indépendant sur la nomination des juges de la Cour suprême du Canada, dont le mandat et les modalités de nomination des membres sont précisés à l'annexe ci-jointe.

[\[Return to Search\]](#)

Date Modified: 2015-06-08



## Privy Council Office

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PC Number: 2016-0693

Date: 2016-07-29

### SCHEDULE

Mandate of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments and Terms and Conditions of Appointment of Members

#### Mandate

**1** The Independent Advisory Board for Supreme Court of Canada Judicial Appointments ("Advisory Board") is an independent and non-partisan body whose mandate is to provide non-binding, merit-based recommendations to the Prime Minister on judicial appointments to the Supreme Court of Canada.

#### Composition of the Advisory Board

**2 (1)** Advisory Board members are appointed during pleasure under paragraph 127.1(1)(c) of the *Public Service Employment Act* as special advisers to the Prime Minister.

**(2)** The Advisory Board is to consist of

**(a)** three members, at least two of whom are not advocates or barristers in a province or territory, nominated by the Minister of Justice;

**(b)** a practising member in good standing of the bar of a province or territory, nominated by the Canadian Bar Association;

**(c)** a practising member in good standing of the bar of a province or territory, nominated by the Federation of Law Societies of Canada;

**(d)** a retired superior court judge, nominated by the Canadian Judicial Council; and

**(e)** a legal scholar, nominated by the Council of Canadian Law Deans.

**(3)** The Governor in Council is to designate one of the members to be the Chairperson of the Advisory Board.

#### Length of Terms

**3 (1)** Advisory Board members are to be appointed for terms of up to five years, which terms may be renewed for one or more further terms.

**(2)** The Advisory Board is to be convened at the discretion and at the request of the Prime Minister.

#### Support

**4** The Office of the Commissioner for Federal Judicial Affairs is to provide support to the Advisory Board and will be responsible for administering the application process.

**5** The Commissioner for Federal Judicial Affairs, or his or her delegate, is to act as an *ex officio* secretary to the Advisory Board.

#### Recommendations

**6 (1)** In accordance with this mandate, the Advisory Board must submit to the Prime Minister for his or her consideration, within the time period specified by the Prime Minister on the convening of the Advisory Board, the names of at least three, but up to five, qualified and functionally bilingual candidates for each judicial vacancy for which the Advisory Board is convened.

**(2)** The Advisory Board must provide an assessment of how each of those candidates meets the requirements of the *Supreme Court Act* and the extent to which they meet the criteria established by the Prime Minister, and any additional reasons in support of their candidacy.

**7** The Prime Minister may request that the Advisory Board provide names of additional qualified candidates who are functionally bilingual.

#### Recommendation Process

**8** Advisory Board members must

**(a)** at all times, observe the highest standards of impartiality, integrity and objectivity in their consideration of all candidates;

**(b)** review applications received from candidates and actively seek out qualified candidates;

**(c)** meet as required to assess candidates and engage in deliberations;

**(d)** be guided by the criteria established by the Prime Minister;

**(e)** consult with the Chief Justice of Canada and any key stakeholders that the members consider appropriate;

**(f)** in establishing a list of qualified candidates, seek to support the Government of Canada's intent to achieve a gender-balanced Supreme Court of Canada that also reflects the diversity of members of Canadian society, including Indigenous peoples, persons with disabilities and members of linguistic, ethnic and other minority communities including those whose members' gender identity or sexual orientation differs from that of the majority; and

**(g)** comply with the *Conflict of Interest Act* and the *Ethical and Political Activity Guidelines for Public Office Holders*.

**9 (1)** Advisory Board members must declare to the other members any direct or indirect personal interest or professional or business relationship in relation to any candidate, including any gift or other advantage received by the members from the candidate.

**(2)** If such a declaration is made, the Advisory Board must decide, having regard to the nature of the interest or relationship, whether the member must withdraw from any deliberations about the candidate.

**(3)** If the Advisory Board decides that the member must withdraw from any deliberations about a candidate, those deliberations are undertaken by the remaining Advisory Board members, provided the number of remaining members is not less than four.

**10** Advisory Board members may travel for the purpose of carrying out their mandate.

#### Confidentiality

**11 (1)** Advisory Board members must sign a confidentiality agreement as a precondition of their appointment.

**(2)** Personal information provided to, and deliberations of, the Advisory Board are confidential and must be treated in a manner consistent with the provisions of the *Privacy Act*.

**(3)** Advisory Board members must keep confidential any information brought before them in the performance of their functions.

#### Reporting

**12 (1)** Within one month after a judge is appointed, the Advisory Board must submit a report, in both official languages, to the Prime Minister that contains information on the carrying out of the mandate,



the costs relating to the Advisory Board's activities and the statistics relating to the applications received.

(2) The report may also contain recommendations for improvements to the process. (3) The report must be made public.

#### Restriction

13 A member of the Advisory Board is not eligible to be considered for a federal judicial appointment for a period of one year after the day on which they cease to be a member of the Advisory Board.

### ANNEXE

Mandat du Comité consultatif indépendant sur la nomination des juges de la Cour suprême du Canada et modalités de nomination des membres

#### Mandat

1 Le Comité consultatif indépendant sur la nomination des juges de la Cour suprême du Canada (le « Comité consultatif ») est un organisme indépendant et non partisan dont le mandat est de fournir au premier ministre des recommandations non contraignantes fondées sur le mérite en ce qui concerne la nomination de juges à la Cour suprême du Canada.

#### Composition du Comité consultatif

2 (1) Les membres du Comité consultatif sont nommés, à titre amovible, conseillers spéciaux du premier ministre en vertu de l'alinéa 127.1(1)c) de la *Loi sur l'emploi dans la fonction publique*.

(2) Le Comité consultatif est composé :

- a) de trois membres dont la nomination est proposée par le ministre de la Justice et dont au moins deux n'exercent pas la profession d'avocat dans une province ou un territoire;
- b) d'un avocat membre en règle du barreau d'une province ou d'un territoire où il exerce la profession et dont la nomination est proposée par l'Association du Barreau canadien;
- c) d'un avocat membre en règle du barreau d'une province ou d'un territoire où il exerce la profession et dont la nomination est proposée par la Fédération des ordres professionnels de juristes du Canada;
- d) d'un juge à la retraite d'une cour supérieure dont la nomination est proposée par le Conseil canadien de la magistrature;
- e) d'un spécialiste du droit dont la nomination est proposée par le Conseil des doyens et des doyennes des facultés de droit du Canada.

(3) Le gouverneur en conseil désigne un des membres à la présidence du Comité consultatif.

#### Durée des mandats

3 (1) Les membres du Comité consultatif sont nommés pour un mandat renouvelable d'au plus cinq ans.

(2) Le Comité consultatif est convoqué à la discrétion et à la demande du premier ministre.

#### Soutien

4 Le Bureau du commissaire à la magistrature fédérale est tenu de soutenir le Comité consultatif et est chargé d'administrer le processus de proposition de candidatures.

**5** Le commissaire à la magistrature fédérale, ou son délégué, est d'office secrétaire du Comité consultatif.

#### Recommandations

**6 (1)** Conformément au présent mandat et pour chaque poste de juge vacant pour lequel le Comité consultatif est convoqué, le Comité consultatif soumet à l'examen du premier ministre, dans la période que ce dernier précise lors de la convocation du Comité consultatif, une liste d'au moins trois et d'au plus cinq candidats qualifiés et effectivement bilingues.

**(2)** Le Comité consultatif fournit une évaluation quant à la manière dont chacun de ces candidats satisfait aux exigences de la *Loi sur la Cour suprême* et quant à la mesure dans laquelle chacun d'eux répond aux critères établis par le premier ministre ainsi que tout motif supplémentaire à l'appui de ces candidatures.

**7** Le premier ministre peut demander au Comité consultatif de lui soumettre les noms de candidats supplémentaires qualifiés et effectivement bilingues.

#### Processus de recommandation

**8** Les membres du Comité consultatif :

- a)** respectent en tout temps les normes les plus strictes d'impartialité, d'intégrité et d'objectivité dans l'examen des candidatures;
- b)** examinent les candidatures qui leur sont soumises et cherchent activement des candidats qualifiés;
- c)** se rencontrent au besoin pour évaluer les candidatures et en délibérer;
- d)** sont guidés par les critères établis par le premier ministre;
- e)** consultent le juge en chef du Canada et les principaux intervenants qu'ils jugent indiqués;
- f)** en vue d'établir une liste de candidats qualifiés, cherchent à appuyer le gouvernement du Canada dans ses efforts pour atteindre, à la Cour suprême du Canada, l'équilibre des genres et la représentativité de la diversité de la société canadienne dont font partie les peuples autochtones, les personnes handicapées et les membres des communautés minoritaires linguistiques, ethniques et autres, y compris celles dont les membres ont une identité de genre ou une orientation sexuelle qui diffère de celle de la majorité;
- g)** respectent la *Loi sur les conflits d'intérêts* et les *Lignes directrices en matière d'éthique et d'activités politiques à l'intention des titulaires de charge publique*.

**9 (1)** Les membres du Comité consultatif doivent déclarer aux autres membres tout intérêt personnel et toute relation professionnelle ou d'affaires, directs ou indirects, à l'égard de tout candidat, y compris tout cadeau ou autre avantage reçus du candidat. **(2)** En cas d'une telle déclaration, le Comité consultatif décide, selon la nature de l'intérêt ou de la relation, si le membre doit se retirer de toute délibération concernant le candidat.

**(3)** Si le Comité consultatif décide que le membre doit se retirer de toute délibération concernant le candidat, les autres membres du Comité consultatif entreprennent les délibérations, à condition qu'ils soient au moins quatre.

**10** Les membres du Comité consultatif peuvent voyager pour remplir leur mandat.

#### Confidentialité

**11 (1)** La signature d'une entente de confidentialité est une condition préalable à la nomination des membres du Comité consultatif.

**(2)** Les délibérations du Comité consultatif ainsi que tous les renseignements personnels qui lui sont communiqués demeurent confidentiels et sont traités conformément à la *Loi sur la protection des renseignements personnels*.

**(3)** Les membres du Comité consultatif assurent la confidentialité de tout renseignement dont ils sont saisis dans l'exercice de leurs fonctions.

#### Rapport

**12 (1)** Dans le mois suivant la nomination d'un juge, le Comité consultatif présente au premier ministre un rapport, dans les deux langues officielles, contenant des renseignements sur l'exécution du mandat et sur les frais liés à ses activités ainsi que des statistiques relatives aux candidatures reçues.

**(2)** Le rapport peut contenir des recommandations visant à améliorer le processus.

**(3)** Le rapport est rendu public.

#### Restriction

**13** La candidature d'un membre du Comité consultatif ne peut être prise en compte pour un poste à la magistrature fédérale qu'après l'expiration d'une période d'un an suivant la date à laquelle il cesse d'être membre.

**[\[Return to Search\]](#)**

Date Modified: 2015-06-08



Government  
of Canada

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du Canada

Canada

## Office of the Commissioner for Federal Judicial Affairs Canada

Home > SCC Appointments > Terms of Reference of the Advisory Board

### Terms of Reference of the Advisory Board

Mandate of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments and Terms and Conditions of Appointment of Members

#### Mandate

1 The Independent Advisory Board for Supreme Court of Canada Judicial Appointments ("Advisory Board") is an independent and non-partisan body whose mandate is to provide non-binding, merit-based recommendations to the Prime Minister on judicial appointments to the Supreme Court of Canada

#### Composition of the Advisory Board

2 (1) Advisory Board members are appointed during pleasure under paragraph 127.1(1)(c) of the *Public Service Employment Act* as special advisers to the Prime Minister.

(2) The Advisory Board is to consist of

(a) three members, at least two of whom are not advocates or barristers in a province or territory, nominated by the Minister of Justice;

(b) a practising member in good standing of the bar of a province or territory, nominated by the Canadian Bar Association;

(c) a practising member in good standing of the bar of a province or territory, nominated by the Federation of Law Societies of Canada;

(d) a retired superior court judge, nominated by the Canadian Judicial Council; and

(e) a legal scholar, nominated by the Council of Canadian Law Deans.

(3) The Governor in Council is to designate one of the members to be the Chairperson of the Advisory Board.

#### Length of Terms

3 (1) Advisory Board members are to be appointed for terms of up to five years, which terms may be renewed for one or more further terms.

(2) The Advisory Board is to be convened at the discretion and at the request of the Prime Minister.

#### Support

4 The Office of the Commissioner for Federal Judicial Affairs is to provide support to the Advisory Board and will be responsible for administering the application process.

5 The Commissioner for Federal Judicial Affairs, or his or her delegate, is to act as an *ex officio* secretary to the Advisory Board.

#### Recommendations

6 (1) In accordance with this mandate, the Advisory Board must submit to the Prime Minister for his or her consideration, within the time period specified by the Prime Minister on the convening of the Advisory Board, the names of at least three, but up to five, qualified and functionally bilingual candidates for each judicial vacancy for which the Advisory Board is convened.

(2) The Advisory Board must provide an assessment of how each of those candidates meets the requirements of the *Supreme Court Act* and the extent to which they meet the criteria established by the Prime Minister, and any additional reasons in support of their candidacy.

7 The Prime Minister may request that the Advisory Board provide names of additional qualified candidates who are functionally bilingual.

## Recommendation Process

8 Advisory Board members must

- (a) at all times, observe the highest standards of impartiality, integrity and objectivity in their consideration of all candidates;
- (b) review applications received from candidates and actively seek out qualified candidates;
- (c) meet as required to assess candidates and engage in deliberations;
- (d) be guided by the criteria established by the Prime Minister;
- (e) consult with the Chief Justice of Canada and any key stakeholders that the members consider appropriate;
- (f) in establishing a list of qualified candidates, seek to support the Government of Canada's intent to achieve a gender-balanced Supreme Court of Canada that also reflects the diversity of members of Canadian society, including Indigenous peoples, persons with disabilities and members of linguistic, ethnic and other minority communities including those whose members' gender identity or sexual orientation differs from that of the majority; and
- (g) comply with the *Conflict of Interest Act* and the *Ethical and Political Activity Guidelines for Public Office Holders*.

9 (1) Advisory Board members must declare to the other members any direct or indirect personal interest or professional or business relationship in relation to any candidate, including any gift or other advantage received by the members from the candidate.

(2) If such a declaration is made, the Advisory Board must decide, having regard to the nature of the interest or relationship, whether the member must withdraw from any deliberations about the candidate.

(3) If the Advisory Board decides that the member must withdraw from any deliberations about a candidate, those deliberations are undertaken by the remaining Advisory Board members, provided the number of remaining members is not less than four.

10 Advisory Board members may travel for the purpose of carrying out their mandate.

## Confidentiality

11 (1) Advisory Board members must sign a confidentiality agreement as a precondition of their appointment.

(2) Personal information provided to, and deliberations of, the Advisory Board are confidential and must be treated in a manner consistent with the provisions of the *Privacy Act*.

(3) Advisory Board members must keep confidential any information brought before them in the performance of their functions.

## Reporting

12 (1) Within one month after a judge is appointed, the Advisory Board must submit a report, in both official languages, to the Prime Minister that contains information on the carrying out of the mandate, the costs relating to the Advisory Board's activities and the statistics relating to the applications received.

(2) The report may also contain recommendations for improvements to the process.

(3) The report must be made public.

## Restriction

13 A member of the Advisory Board is not eligible to be considered for a federal judicial appointment for a period of one year after the day on which they cease to be a member of the Advisory Board.

**Pages 434 to / à 449**  
**are withheld pursuant to section**  
**sont retenues en vertu de l'article**

**23**

**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**

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Author / Mr. Barry G. Fleming VIP  
Auteur: President

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The Law Society of Newfoundland and Labrador  
P.O. Box 1028  
St. John's NL A1C 5M3

Subject / Sujet: 240003  
Provincial Law Societies

Due Date / Date d'échéance: 2016-09-12

Sector's Due Date / Date d'échéance du secteur:

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Assigned Date / Assigné le: 2016-08-19

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CC: S. Saville  
CC: J. Gauthier

CC: Minister  
CC: C. Leclerc/C. Patry  
CC: J. Rousseau

CC: A. Taschereau  
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240003

## **The Law Society of Newfoundland and Labrador**

**P.O. Box 1028 St. John's, NL A1C 5M3**

16 August 2016

The Right Honourable Justin Trudeau, P.C., M.P.  
Prime Minister  
Langevin Building  
80 Wellington Street  
Ottawa, ON K1A 0A2

The Honourable Jody Wilson-Raybould, P.C., M.P.  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8

Dear Prime Minister and Minister of Justice:

### **Re: Supreme Court of Canada Appointment Process**

I write further to the August 2, 2016, announcement that the Federal Government will utilize a new process for the appointment of Supreme Court of Canada Justices. The process is laudable in its inclusivity and transparency. The composition of the Advisory Board will yield highly qualified candidates and ensure a measure of accountability in the ultimate selection of a Justice.

Two facets of the new appointment process raise serious concerns for the Law Society of Newfoundland and Labrador (LSNL). The first is that the Advisory Board is limited in selecting candidates who are functionally bilingual. While we recognize that functional bilingualism would be an asset for any nominee to the Court, an absolute requirement for that skill unfairly limits the number of qualified candidates. With advances in transcription technology and the proliferation of lawyers and judges who can read and speak some French, a strict application of this criteria will limit the number of potential nominees from Newfoundland and Labrador.



## **The Law Society of Newfoundland and Labrador**

The LSNL is also concerned about the potential for the next appointee to the Supreme Court of Canada to be selected from a region other than Atlantic Canada. We understand that Supreme Court Justices determine issues on their merit, as opposed to the region from which they arise, but the Supreme Court of Canada is also an important symbol of our democracy and the promise of inclusivity. To break with the constitutional convention of appointing a candidate from Atlantic Canada would have the potential of lessening the importance of this institute in the eyes of an entire region of this Country. As well, given the constitutional nature of this convention, it is possible that litigation may ensue. This was implied by Chief Justice McLachlin in her comments to the media on August 11<sup>th</sup> when she told reporters that she couldn't comment on the issue of regional representation on the Court as it could one day come before the Court. Any litigation surrounding the appointment process would mar the otherwise commendable aspects of it.

While we applaud many aspects of the new selection process, we request that you modify it to incorporate our concerns raised above.

Yours truly,



s.19(1)

Barry G Fleming, QC  
President

## Ministerial Correspondence Unit - Justice Canada

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**From:** [REDACTED]  
**Sent:** August-16-16 1:50 PM  
**To:** justin.trudeau@parl.gc.ca; Ministerial Correspondence Unit - Justice Canada  
**Cc:** Fleming, Barry; [REDACTED]  
**Subject:** Letter from President of the Law Society of Newfoundland and Labrador  
**Attachments:** 16 August 2016 - Letter to Prime Minister and Minister of Justice re-Supreme Court of Canada Appointment Process.pdf

Prime Minister Trudeau and Minister Wilson-Raybould,

Please find attached a letter from Mr. Barry Fleming, QC, President of the Law Society of Newfoundland and Labrador. This letter relates to the Supreme Court of Canada Appointment Process.

A hard copy of the attached will follow, via regular mail.

Regards.

s.19(1)

[REDACTED]  
*Law Society of Newfoundland & Labrador*  
PO Box 1028  
St. John's, NL A1C 5M3  
Tel: (709) 758-0814  
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**To:** Ministerial Correspondence Unit - Justice Canada[mcu@justice.gc.ca]  
**Cc:** Bambrick, Lisa (JUS)[Lisa.Bambrick@justice.gc.ca]  
**Subject:** 2016-018132 - Scc appointment process Standard lines  
**Sent:** Mon 8/29/2016 8:02:47 PM  
**From:** Desbiens, Alex

RE: Yellow Dockets on SCC Appointment Process

Good afternoon,

Please draft a response with standard lines for this yellow docket request. You should have all the information needed to complete this response, as indicated in the attached email sent from Nicole Butcher (I brought the yellow dockets in question this morning). I will bring you the yellow docket shortly.

Thank you very much,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector

Department of Justice Canada / Government of Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs

Ministère de la Justice Canada / Gouvernement du Canada

[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tél : 613-941-7888

## Question Period Note

### SUPREME COURT OF CANADA APPOINTMENTS PROCESS

#### ISSUE:

How is the Government delivering on its commitment to strengthen the process for appointing Supreme Court of Canada justices and ensure new appointees are functionally bilingual?

#### PROPOSED RESPONSE:

- On August 2, 2016, the Prime Minister announced a new process to appoint justices of the Supreme Court of Canada. It reflects our commitment to a process that is transparent, inclusive and accountable to Canadians, and to ensure that appointees are functionally bilingual.
- The openness of this new process is unprecedented. Following an open application process, an independent, non-partisan Advisory Board—chaired by former Prime Minister Kim Campbell—will assess candidates based on published criteria and produce a shortlist of three to five outstanding jurists.
- Parliamentarians will play an essential role at several points:
  - I will consult Opposition Justice critics and members of the House Justice Committee on the shortlist.
  - I will appear before the Justice Committee with Ms. Campbell to explain the Government's choice.
  - Finally, the nominee will take part in a moderated question and answer session with representatives of all parties in the House and Senators.
- This process will ensure that outstanding, functionally bilingual jurists who are reflective of Canadian society are appointed to our top court.

*If asked about whether Atlantic Canada will lose its seat on the Court:*

- Our Government understands the importance of providing for regional representation on the Court and will endeavor to maintain it while ensuring that the best candidate is nominated.

- Indeed, in recognition of the custom of regional representation, the Prime Minister has directed the Advisory Board to include candidates from Atlantic Canada on the shortlist.
- Our Government has also sought to simultaneously uphold other important values by establishing a transparent process that includes consideration of all of Canada's diverse communities while at the same time identifying excellent jurists qualified for appointment to our Supreme Court.
- This process demonstrates that we are committed to ensuring that the best candidate is appointed and that our highest Court moves toward a better reflection of the diversity of Canadians.

*If asked about functional bilingualism:*

- To be functionally bilingual, a candidate must be able to read materials and understand oral argument in both official languages, without the need for translation or interpretation. Ideally, he or she could also converse with counsel in both languages, but this is not a requirement.

*If asked about the lack of engagement of political parties on the design of the process:*

- The intention of the Government's commitment was to ensure that members of Parliament are engaged in the process itself.
- As I have described, the new process gives an important role to members of Parliament and provides many opportunities for their involvement. This includes hearing from members of the Standing Committee on Justice and Human Rights on possible improvements to the process, based on the experience with filling this current vacancy.

## BACKGROUND:

Echoing the Liberal Party platform, the Minister's mandate letter states: "Engage all parties in the House of Commons to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians. Consultations should be undertaken with all relevant stakeholders and those appointed to the Supreme Court should be functionally bilingual."

Since 2004, successive governments have used various processes for filling Supreme Court of Canada (SCC) vacancies. Some involved an advisory committee, composed exclusively or partially of parliamentarians, to recommend a shortlist of candidates derived from a longer list provided by the Government's choice; in other cases, the nominees themselves appeared. For the three most recent appointments, neither an advisory committee nor a parliamentary hearing was used.

On March 22, 2016, the Supreme Court of Canada announced Justice Cromwell's retirement, effective September 1, 2016.

On August 2, 2016, the Prime Minister announced a new appointment process that would be used for Justice Cromwell's pending vacancy as well as future ones. This included the establishment of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments, chaired by former Prime Minister Kim Campbell (nominated by the Minister of Justice), and consisting of six other members: two lay members nominated by the Minister of Justice and four jurists nominated by outside legal organizations (Canadian Judicial Council, Canadian Bar Association, Federation of Law Societies of Canada, and Canadian Council of Law Deans).

The August 2 announcement coincided with the launch of the first ever open application process for SCC appointments. Questionnaires completed by candidates were sent to the Office of the Commissioner for Federal Judicial Affairs (CFJA), whose officials have provided secretariat support to the Advisory Board. The CFJA website provides links to the terms of reference for the Advisory Board, the Qualifications and Assessment Criteria, instructions on how to apply, and Frequently Asked Questions related to the process. The application period closed on August 24.

Media reports since the Prime Minister's announcement have been mixed, welcoming the increased transparency and independence of the process but criticizing certain aspects. The main critiques are listed below.

- **Potential departure from regional convention:** While the Prime Minister's mandate letter to the Advisory Board (published on the PM website) asks that the shortlist include candidates from Atlantic Canada, the application is open to all Canadians and the Government has made clear that it is not committed to following the regional custom. Commentators and Justice critic Rob Nicholson have criticized the potential loss of the "Atlantic seat" on the Court.
- **Requirement for functional bilingualism:** Several commentators have suggested that requiring candidates to be functionally bilingual unduly narrows the field, and some have questioned the constitutionality of setting this as a requirement. Conversely, certain commentators have argued that the functional bilingualism requirement should be enshrined in legislation.
- **Focus on diversity over merit:** Some commentators have criticized the emphasis on diversity, arguing that this risks the appointment of SCC justices based on characteristics other than their legal skill.
- **Lack of participation of MPs on Advisory Board:** Some commentators have drawn attention to the fact that in previous processes, MPs participated in the development of a shortlist, and so have criticized the Advisory Board as being elitist and lacking in the legitimacy brought by the participation of elected representatives.
- **Lack of consultation on design of process:** Some commentators – particularly NDP leader Tom Mulcair and Justice critic Murray Rankin – have criticized the fact that Opposition parties were not consulted on the design of the process.

The Minister appeared before the House Justice Committee on August 11 to explain the process and answer questions about it. Some of the concerns raised by MPs echoed the critiques listed above, particularly with respect to the potential departure from the regional convention. NDP leader Tom Mulcair criticized the Government's definition of "functionally bilingual" as insufficient, noting that the definition did not required the candidate to be able to speak both official languages.

## CONTACTS:

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Author / Auteur: Ms. Bobbi-Jo Dow Baker VIP  
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Charlottetown PE C1A 7K2

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Judges - General

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August 30, 2016

The Right Honourable Justin Trudeau, P.C., M.P.  
Prime Minister of Canada  
Office of the Prime Minister, Langevin Block  
80 Wellington Street  
Ottawa, ON  
K1A 0A2

The Honourable Jody Wilson-Raybould, P.C., M.P.  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, ON  
K1A 0H8

MINISTER OF JUSTICE  
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Dear Prime Minister and Minister of Justice:

**Re: Supreme Court of Canada Appointments**

I am writing to you as President of the Law Society of Prince Edward Island, the regulator of the legal profession in Prince Edward Island in the public interest.

While our Law Society commends the leadership taken by your government in establishing an open and transparent process regarding Supreme Court appointments, we urge you to recognize and respect the long standing constitutional convention of Atlantic Canada being represented on the Supreme Court in replacing Justice Thomas Cromwell. Since inception in 1875, the composition of the Supreme Court has always included at least one judge from Atlantic Canada and it would therefore be a contravention of the convention if there was not such an appointment made. A fundamental change to this convention, we submit, would require careful consideration and consultation with provincial and territorial governments, the judiciary and the bar.

The Law Society of Prince Edward Island strongly believes that regional representation is imperative in supplying the Supreme Court with the diversity of the society it serves; to do otherwise would not only be contrary to the constitutional convention, but also contrary to the interests of the public. Regional representation is one of the ways by which the diversity of Canada has been represented in our highest court. Atlantic Canada encapsulates the diversity found throughout the country, and therefore all criteria can be satisfied while still maintaining regional representation.

We whole-heartedly agree with the Canadian Bar Association's commentary that the vacancy created by Justice Cromwell's retirement should be filled by a meritorious candidate from



2.

Atlantic Canada and regional representation should be observed when future vacancies are filled. This same idea has been expressed by our colleagues in New Brunswick, Nova Scotia and Newfoundland & Labrador.

We strongly urge you to continue to follow the constitutional convention with respect to Atlantic Canada's representation on the Supreme Court of Canada.

Yours truly,



s.19(1)

Bobbi-Jo Dow Baker, President